

Access and Openness in Ontario: A Legal Analysis of How Children’s Important Relationships can be Maintained¹

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1. INTRODUCTION

On April 30, 2018, the Ontario *Child, Youth and Family Services Act*⁵ (“CYFSA”) came into force and made significant changes to the child protection and adoption landscapes in Ontario. The amendments have had a particularly significant impact on access for children placed in the extended care⁶ of a children’s aid society⁷ (“Society” or “Societies”) and openness for children placed for adoption. There is an increased recognition of the importance of children maintaining connections after an extended care order.

Broadly speaking, some of the key legislative changes that have impacted post-extended care access and openness for children placed for adoption include:

1. An increased focus on children’s rights: the first statement in the *Preamble* recognizes that “children are individuals with rights to be respected and voices to be heard.” The *Preamble* also recognizes that the aim of the *Act* is to be consistent with, and build upon, the principles expressed in the United Nations Convention on the Rights of the Child⁸ (“UNCRC”). The *UNCRC* principles not only help inform the approach to post-extended care access and openness, but the specific legislative changes also reflect those principles. For instance, consistent with Article 12,⁹ the first and

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⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1.

⁶ A child in “Extended Society Care” under the *CYFSA* replaces the term “Crown Ward” under predecessor legislation. Different terms for “extended care” are used in different provinces, including “permanent guardianship”, “permanent care and custody”, “permanent custody of the Director” or “continuous custody of a manager”.

⁷ The term “children’s aid societies” used in this paper refers to agencies designated by the Minister to provide child protection services and adoption services under sections 34-36 *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, and includes societies designated to provide services to First Nations, Inuit and Métis children and families.

⁸ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

mandatory consideration in the best interests analysis is now a child's views and wishes, given due weight in accordance with their age and maturity¹⁰; consistent with Article 3,¹¹ the former restrictive test for access to a child in extended care has changed to a comprehensive best interests analysis¹²; and consistent with Article 8,¹³ there is an increased focus on the rights of children to preserve their identity, family relations, culture, and connection to community.¹⁴

2. The *CYFSA* and the new Federal Act: *An Act respecting First Nations, Inuit and Métis children, youth and families*¹⁵ ("Federal Act") have expanded the coverage and protections for First Nations, Inuit, and Métis ("FNIM") children and families. Both the Ontario Legislature and Parliament have committed to ensuring that FNIM children maintain connections to their culture and communities, and wherever possible, to their families.

This article will address the following issues related to access to children in extended care and openness:

1. The key differences between access, contact and openness.
2. Ontario's evolving approach to access to children in extended care, including how the test for access for children in extended care has changed over the last two decades from an extremely restrictive test to a broad best interests analysis where access orders are routinely made, and how courts have rejected the strict judicial interpretations made under the former *Child and Family Services Act* ("CFSA").
3. The additional considerations for access to FNIM children, including a review of the new provisions under the *CYFSA* and the *Federal Act* and the importance courts have placed on FNIM children maintaining contact with their families, culture, and communities.
4. Specific legal issues related to access to children in extended care, including case law surrounding "discretionary access orders", the confusion between "no access" and "no contact", and the process for "access holders" to bring applications for openness under the *CYFSA*.

⁹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 12 (entered into force 2 September 1990).

¹⁰ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 74(3).

¹¹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 3 (entered into force 2 September 1990).

¹² *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, ss. 104, 105(6).

¹³ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 8 (entered into force 2 September 1990).

¹⁴ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, Preamble, ss. 1, 74(3), 100(f), 179, 197.

¹⁵ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24.

5. Openness as a legal construct in Ontario. The discussion will include how openness has evolved since it was introduced in Ontario's legislation in 2006, the openness provisions introduced under the *CYFSA*, including the new openness process for First Nation, Inuit and Métis children, the interaction of the provisions with the *Federal Act*, provisions addressing openness when there is adoption breakdowns or disruptions and provisions that expand a child's participation and notification rights under the *CYFSA*. This section will also provide an overview of the openness options available in Ontario and discuss how they are practically applied.
6. The involvement of the Office of the Children's Lawyer (OCL) in openness. The OCL has regularly represented children in openness files since 2011. However, since the *CYFSA* was introduced in 2018, the OCL must be served in every case, and it is involved in all openness proceedings. This section will review the increase in openness files since 2012 and the types of openness files that are received by the OCL.
7. The caselaw on openness separated into:
 - (a) Substantive decisions that focus on the factors a court considers on an openness application. This includes whether the order will impact the stability of the adoptive placement, the views and wishes of children and whether openness can support a child's identity characteristics and connection to culture; and
 - (b) Procedural decisions impacting on openness ranging from who is given notice when a child will be placed for adoption, who is a party on an openness application, important time limits, the involvement of non-parties in openness proceedings, the test on a withdrawal of an openness application and rights of appeal.

There are several key concepts throughout the various sections of this article, and they all underscore a significant shift in how access and openness have been expanded for children and families in Ontario. This shift began in 2006 when openness was introduced and continued through to 2018 with the introduction of the new access test under the *CYFSA*. Additionally, several important judicial decisions since 2018 have provided further direction on the implementation of the legislative changes. While these shifts have layered some additional complexity on permanency planning, Ontario now has a cohesive approach to maintaining relationships post-extended care in which children's voices are heard and children are provided with legal options to maintain important relationships.

2. ACCESS, CONTACT AND OPENNESS: THREE DISTINCT CONCEPTS

Before addressing the broader topic of access to children in extended care under the *CYFSA*, it is important to understand the three distinct concepts under the *Act* that deal with ways children in extended care can maintain relationships with people who are not caring for them: access, contact, and openness. These concepts are sometimes conflated or confused and knowing their differences

assists in understanding some of the unique issues involving access to children in extended care.

After a child is placed into extended care, the Society becomes the child's statutory parent. It is required to make all "parenting" decisions for the child,¹⁶ including where the child will live and with whom the child will spend time. A child placed in extended care may only speak with, visit, or receive visits from their family or extended family *as of right* as outlined in an access or openness order or an openness agreement.¹⁷

An "access" order is an exception to the autonomy of the Society to make decisions for the child and it is granted after the court has determined that the order is in the best interests of the child. It provides an individual with an entitlement to visit or communicate with the child and/or a child's entitlement to visit or communicate with an individual.¹⁸ Correspondingly, it creates an obligation on the Society to make the child in extended care available for access with the individual named in the order. The terms and conditions of the order become enforceable against the Society by the child and/or by the individual named in the order.

An access order will typically provide a minimum amount of time that a child will spend with a person. For example, X shall have access to Y a minimum of twice per month for a minimum of 3 hours per visit. Where there are demonstrated concerns about a person's behaviours that may affect the child's best interests during access, additional terms surrounding access might be imposed. For example, X shall not speak negatively about the child's father or X shall not be under the influence of drugs or alcohol during the visits. Conditions can also be imposed. For example, for a parent who regularly does not attend access visits, a condition might be "X shall confirm that he or she will attend the visit 24 hours before it is scheduled to occur. If X does not confirm their attendance 24 hours in advance of the visit, the visit will be cancelled."

"Contact" is different than access. While access can be viewed as a "right" or "entitlement" to visit or communicate with a child, contact with a child simply describes visits or communication that a child has with an individual. There are no "rights" or "entitlements" attached to "contact" with a child. This concept is referenced in section 105(9) of the *CYFSA* and confirms that a Society, as a child's statutory parent, can permit contact or communication with a person and a child in the absence of an access or openness order where the Society believes that such contact or communication is in the best interests of the child.¹⁹

Contact between a child and another individual can be in addition to the minimum access rights that a person has with a child, or it could include visits or communication with individuals who have no right of access to the child.²⁰ For

¹⁶ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 111.

¹⁷ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 10(2).

¹⁸ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 104.

¹⁹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 105(9).

example, a mother might be entitled to a minimum of one access visit per week, but the Society may allow contact visits beyond the once per week visit, as well as additional telephone calls that have not been specified in the access order. Furthermore, a grandmother might not have any right of access to the child, but the Society might allow weekend visits with the grandmother once per month if it determines that such contact is in the best interests of the child.

While courts cannot force Societies to exercise their discretion to allow “contact” between a child and another individual in the absence of an access or openness order, courts can restrict a child’s contact with an individual through a restraining or “no contact” order pursuant to section 137 of the *CYFSA*. However, before making such order, notice needs to be served personally on the individual to be named in the order.²¹

“Openness” can take the form of an order or agreement and it is intended to facilitate communication or the maintenance of a child’s relationships with individuals after the child has been placed for adoption.²² For First Nations, Inuit and Métis (“FNIM”) children, openness orders also help FNIM children to develop or maintain a connection with the child’s FNIM cultures, heritages and traditions and to preserve the child’s cultural identity and connection to community.²³

Openness can include face-to-face visits or indirect contact such as cards and letters.²⁴ One of the key differences between openness and access is that openness does not involve any parental rights or decision-making for the child. Section 217 of the *CYFSA* states that once an adoption order has been made, the child ceases to be the child of the person who was their parent before the adoption order was made and the person is no longer the parent of the adopted child.²⁵ Most often, openness is structured as minimum amounts of contact (such as three visits a year). In most cases, the adoptive parents will be present for the visits, as ideally openness involves a family coming together to wrap around a child as opposed to sending the child to another home for visits.²⁶

3. ONTARIO’S EVOLVING APPROACH TO ACCESS FOR CHILDREN IN EXTENDED CARE

Over the past 15 years, Ontario’s approach to access orders for children in extended care has significantly evolved. These orders have gone from a rare

²⁰ *J.S.R. v. Children’s Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at paras. 50 and 55.

²¹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 137.

²² *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, ss. 179(1), 212.

²³ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 179(1).

²⁴ *Child, Youth and Family Services Act*, S.O. 2017, c.14, Ontario Reg 155/18, s. 94(1).

²⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 217. (Note that this does not apply when the person adopting is a spouse of the adoptive parent).

²⁶ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at paras. 113-116.

occurrence to being made on a regular basis. To fully understand this evolution, it is important to review the legislative history and context.

Under the former *CFSA*²⁷ it was extremely difficult for a parent or a child to obtain an access order in relation to a child who was a Crown ward (now referred to as a child in the Society's "extended care" under the *CYFSA*). There was a "presumption against access" and an onus on the person seeking access to establish that two preconditions were met: 1) that their relationship was beneficial and meaningful to the child, and 2) that any ordered access would not impair the child's opportunities for adoption. The judicial interpretations of these two statutory factors developed at a time when the legislation prevented a child from being placed for adoption if there was an outstanding access order.²⁸ At that time, where a child was found to be "adoptable", the court was prevented from granting an access order except in extraordinary circumstances. Since courts had to choose between an access order or adoption for a child, the interpretation of the test for access to a Crown ward under the former *CFSA* was extremely, and intentionally, restrictive.²⁹

The leading case on the meaning of "beneficial and meaningful relationship" under the former *CFSA* was the 2004 decision of Justice Quinn in *Children's Aid Society of Niagara Region v. J. (M.)*.³⁰ In that decision, Justice Quinn found that the word "meaningful" meant significant, and the word "beneficial" meant advantageous. He then went on to find that a parent seeking access to a Crown ward had to demonstrate that their relationship with the child was "significantly advantageous" to the child. Rather than examining whether there was a "beneficial relationship" and a "meaningful relationship" as stated in the statute, he used one of the words to modify the other, creating a stricter standard. While this interpretation did not comport with the plain language of the statute, such an interpretation was understandable in the context under which courts were operating — they had to choose between access and permanency for children.

In addition, Justice Quinn found that courts cannot consider a "future relationship" under the former beneficial and meaningful portion of the access test.³¹ This led many courts to conclude that the test for access precluded the consideration of any "future" or ongoing benefits of an access relationship.³²

²⁷ *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 59(2.1) as repealed by *Supporting Children, Youth and Families Act*, 2017, S.O. 2017, c. 14, s. 350.

²⁸ *Child and Family Services Act*, R.S.O. 1990, c. C. 11, s. 141.1(a) as it appeared on 25 October 2010.

²⁹ *Children's Aid Society of Niagara Region v. J. (M.)*, 2004 CarswellOnt 2800, [2004] O.J. No. 2872 (Ont. S.C.J.) at paras. 45-50 and *Children's Aid Society of Toronto v. L. (T.)*, 2010 ONSC 1376, 2010 CarswellOnt 1343 (Ont. S.C.J.) at paras. 27-30.

³⁰ *Children's Aid Society of Niagara Region v. J. (M.)*, 2004 CarswellOnt 2800, [2004] O.J. No. 2872 (Ont. S.C.J.) at paras. 45-47.

³¹ *Children's Aid Society of Niagara Region v. J. (M.)*, 2004 CarswellOnt 2800, [2004] O.J. No. 2872 (Ont. S.C.J.) at para. 46.

³² *Children's Aid Society of Toronto v. G. (A.)*, 2015 ONSC 6638, 2015 CarswellOnt 16534

In 2011, the Legislature amended the *CFSA* to allow a child to be placed for adoption even where there was an outstanding access order. As a result, the amendments terminated access orders respecting a child upon placement for adoption. However, before placing a child for adoption, the Society was required to serve notice on an access holder (the person who has been granted an access order) and access recipients (the person with respect to whom an access order has been granted). Access holders were then given the right to bring an application for openness. This process, which continues today, significantly broadened the ability for children to continue to have some form of contact with people who were important to them through “openness” after adoption.³³

Despite the 2011 legislative changes and the increased focus on “openness” after adoption, the strict interpretation of the test for access to a Crown ward did not change. While some judges were slowly shifting away from the stringent application of the former test,³⁴ many judges continued to apply it.³⁵

In 2018, the *CFSA* was repealed and replaced by the *CYFSA*.³⁶ The *CYFSA* made major changes to the statutory scheme for child protection by “amongst other things, significantly expanding the test for access to children in extended care by focusing on the best interests of the child and respect for a child’s wishes, and by emphasizing the special considerations that apply to children of Indigenous heritage.”³⁷ The Legislature clarified that courts are not to apply the strict test for access under the former *CFSA*. Instead, courts are required to consider whether it is in the “best interests” of children to continue to have some form of access with a person after they are placed in the Society’s extended care.³⁸

The legislative decision to move to a “best interests” test was made because the previous preconditions under the *CFSA* for granting access “were too restrictive, resulting in the termination of access between children and those who are important to them.” The legislative intention was also to clarify that courts could make an access order for a child in the Society’s extended care if it was in the overall best interests of the child to do so.³⁹

(Ont. S.C.J.) at para. 77 and *Children and Family Services for York Region v. O. (K.)*, 2016 ONSC 225, 2016 CarswellOnt 551 (Ont. S.C.J.) at para. 59.

³³ *Building Families and Supporting Youth to be Successful Act, 2011*, S.O. 2011, c. 12, ss. 2, 3 and 6.

³⁴ *Children’s Aid Society of Toronto v. T.R.*, 2017 ONCJ 505, 2017 CarswellOnt 11774 (Ont. C.J.) paras. 132-139.

³⁵ *Children’s Aid Society of Toronto v. G. (A.)*, 2015 ONSC 6638, 2015 CarswellOnt 16534 (Ont. S.C.J.) paras. 45-55.

³⁶ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1.

³⁷ *L.M. v. Peel Children’s Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 2.

³⁸ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, ss. 105(4), (5) and (6) and 74(3).

³⁹ Ontario, Child Welfare Secretariat, *Child, Youth and Family Services Act*, 2017: Guide

In determining whether access is in the best interests of a child under the new *CYFSA*, the starting point and first mandatory consideration is the child's views and wishes, which must be given due weight in accordance with their age and maturity. Even where children's views and wishes are difficult to ascertain because of age or special needs, those who provide services to children must attempt to find ways to listen so that *all* children can be heard.⁴⁰

The second mandatory consideration is the importance of preserving an Indigenous child's cultural identity and connection to community. Other considerations, if relevant, include:

- the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,
- the child's physical, mental and emotional level of development,
- the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,
- the child's cultural and linguistic heritage,
- the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family,
- the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,
- the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,
- the merits of a plan for the child's care proposed by a Society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent,
- the effects on the child of delay in the disposition of the case,
- the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and
- the degree of risk, if any, that justified the finding that the child is in need of protection.⁴¹

The two additional factors are whether the person seeking access to the child has a relationship that is beneficial and meaningful to the child, and if relevant, whether any ordered access would impair the child's future opportunities for adoption.⁴² Under the former *CFSA*, these two factors were the only factors considered and they were "preconditions" to ordering access. Under the *CYFSA*,

to Support the Implementation of Select Provisions of the *CYFSA*, (Guidelines), Ministry of Children and Youth Services ("*CYFSA* Implementation Guide") at page 31.

⁴⁰ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 102 and *Catholic Children's Aid Society of Toronto v. R.H.*, 2018 ONCJ 854, 2018 CarswellOnt 20591 (Ont. C.J.) at para. 101.

⁴¹ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, ss. 105(5) and 74(3).

⁴² *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 105(6).

these factors are two of more than 15 factors to be considered under the less restrictive best interests analysis.

In *Kawartha-Haliburton Children's Aid Society v. M.W.* (“Kawartha”)⁴³, the Court of Appeal for Ontario acknowledged that the Legislature significantly changed the test for access under the *CYFSA*, to a comprehensive and less rigid test. Justice Benotto stated that the change to the access test is “not just semantics [it] represents a significant shift to the approach to access for children in extended care.” Some of the changes to the test for access highlighted in *Kawartha* include:

- the burden is no longer on the person requesting access to demonstrate that their relationship to the child is beneficial and meaningful and in no way will impair the child’s future adoption opportunities;
- when the court undertakes a best interests analysis, it assesses whether the relationship is beneficial and meaningful to the child, and considers the potential impairment to future adoption opportunities, but only as part of this assessment and only where relevant; and
- there is no longer a “presumption against access” and it is no longer the case that a parent who puts forward no evidence will not gain access.

After the *Kawartha* decision, some questions remained about the application of the new test for access to children in extended care and the relevance of the former case law under the *CFSA* interpreting the “beneficial and meaningful” consideration. Lower courts were divided on:

- whether the interpretation of “beneficial and meaningful” as meaning “significantly advantageous” still applies under the *CYFSA*;
- whether the “beneficial and meaningful” consideration plays a heightened importance in the analysis of whether access is in the best interests of a child; and
- whether future benefits of an access relationship can be considered in the analysis.

Some judges found that the previous strict interpretations of “beneficial and meaningful relationship” still apply under the *CYFSA*, while other judges departed from this reasoning in favour of a more holistic and child-focused interpretation under the new best interests analysis.

The Court of Appeal for Ontario settled the debate in *Children's Aid Society of Toronto v. J.G.*⁴⁴ Justice Benotto, writing for the Court, found that “the judicial injection of the words ‘significantly advantageous’ into the analysis may have applied under the old *Act* but it falls far short of the expansive best interests considerations under the new *CYFSA*.”⁴⁵ Further, she wrote that the

⁴³ *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316, 2019 CarswellOnt 5927 (Ont. C.A.).

⁴⁴ *Children's Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.).

⁴⁵ *Children's Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at para. 44.

consideration of whether the relationship is beneficial and meaningful for the child is only *one aspect* of the best interests analysis. She noted:

By adopting a best interests test to determine access, the legislature changed the previous highly restrictive test that had tended towards termination of access between children and those important to them. Access can now be ordered for a child in extended care if it truly is in the overall best interests of the child. The overall best interests involve a consideration of the 15 articulated factors plus “any other circumstance of the case that the person [deciding the case] considers relevant”: section 74(3)(c). Under s.105(6), whether the relationship is “beneficial and meaningful to the child” and only if the court considers it relevant, whether the ordered access will impair the child’s future opportunities for adoption remain relevant, but only as viewed through a global best interests lens.⁴⁶

Justice Benotto also found that when a court is looking at whether a relationship is beneficial and meaningful to a child and whether access is in the best interests of the child, the court is not prevented from considering future benefits of the access relationship. She noted that when a court considers a child’s best interests, it should consider all relevant factors, “whether past, present or future.”⁴⁷

Finally, the Court in *JG* canvassed arguments about presumptions and onuses in relation to the test for access to children in extended care.⁴⁸ Justice Benotto confirmed again that there is “no presumption against access” to children in extended care. When discussing the issue of onus, she stated that it was more nuanced. She did not find it helpful to import the concept of onus “when the court is required to consider and balance the various factors that affect the life of a child in protection.” The court is not called upon to make findings of facts about past events. Instead, a “child’s best interests in connection with future access involve a delicate weighing and balancing of multiple factors. It is not a fact-finding mission and the exercise is not assisted by determining what the onus is or where it lies.”⁴⁹

(a) Impairment of Adoption Opportunities

Under the former *CFSA*, individuals seeking access to a child in extended care needed to establish that the ordered access would not impair the child’s opportunities for adoption. This was a difficult burden to meet because the Society usually had all the information related to a child’s potential adoption

⁴⁶ *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at para. 47.

⁴⁷ *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at paras. 46 and 48-53.

⁴⁸ *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at paras. 37 and 56-58.

⁴⁹ *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at paras. 60-63.

prospects and many judges found that Societies did not have an obligation to adduce evidence on this issue. As a result, there was often little evidence before courts that would assist them in determining whether access, or a specific type of access, would impair a child's opportunities for adoption. This led many courts to find that the person seeking access failed to establish that access would not impair a child's opportunities for adoption. In some cases, judges assumed or took judicial notice that any ordered access would impair a child's opportunities for adoption.

Under the *CYFSA*, the previous "impair adoption" requirement became one of many considerations under the broader best interests analysis, and it only applies if the court considers it to be relevant. In the *Kawartha* decision, the Court highlighted this significant change when it stated "while any evidence of possible impairment to adoption opportunities would have thwarted previous requests for access, under the new *Act*, access is to be ordered for a child with otherwise excellent adoptive prospects if it is in her overall best interests. And, as shown in section 74(3) of the *CYFSA*, the best interests analysis is comprehensive."⁵⁰

In *L.M. v. Peel Children's Aid Society*,⁵¹ the Court of Appeal for Ontario addressed the practice of some judges who took judicial notice or used "common sense" to assume that an access order would impair a child's opportunities for adoption. On a motion for summary judgment, Justice Dunn took judicial notice that "many if not most adoptive parents would not want relations with a birth parent, and would not proceed with an adoption if there was an access order."⁵² The decision not to grant access was appealed and the first appellate judge, Justice Trimble, found that this "fact" does not meet the criteria for taking judicial notice. However, Justice Trimble found that Justice Dunn did not err because courts have set out several "common sense" reasons why an adoptive parent would not want access to birth parents based on the informed experience of courts dealing with adoption matters, including:

- "the deterrent effect access might have on adoptive parents who might face further litigation, who would not know the result of such litigation, who would not know the form that openness might take, and would face delays in the adoption by the openness application"; and
- "if an openness order is granted the adoptive parents may have to deal with potentially difficult birth parents without the assistance of a Children's Aid Society unless the Children's Aid Society agreed to become or continue to be involved"; and

⁵⁰ *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316, 2019 CarswellOnt 5927 (Ont. C.A.) at para. 49.

⁵¹ *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.).

⁵² *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 3.

- “birth parents of an adopted child are frequently difficult to deal with and might undermine a potential placement for adoption, or the adopted parents’ relationship with the child.”⁵³

The children’s mother appealed this decision to the Court of Appeal for Ontario. At the appeal hearing, the OCL brought a motion to adduce fresh evidence for the purpose of demonstrating why a court should not take judicial notice or use “common sense” to determine that access would impair a child’s opportunities for adoption. The fresh evidence consisted of an affidavit from the former Director of Adoption Ontario and a professor at the University of Toronto who conducted a literature review.⁵⁴

Patricia Convery, the former Executive Director of the Adoption Council of Ontario provided evidence that, in her experience from a provincial perspective:⁵⁵

- in-person contact between birth family and the child is not a deterrent for finding adoptive families, even when those children have high special needs;
- while adoptive families are hopeful to have guidance from their local CAS in facilitating contact with birth families, they generally recognize the benefit of children maintaining birth family connections where the relationship is beneficial for the child. The challenge is ensuring that the necessary education/supports are in place to help the parties to address their concerns and fears;
- prospective adoptive parents cannot be approved as adoptive parents unless they indicate a willingness to consider openness in adoption;
- the mandatory training (SAFE AND PRIDE training) for prospective adoptive parents highlights the importance of openness connections with birth family members; and
- ongoing contact with birth families can assist to stabilize an adoptive placement.⁵⁶

The former Executive Director also confirmed many of the findings from the professor’s literature review.⁵⁷ The literature review found that openness can have many positive impacts on a child, including:

- minimizing a child’s loss of relationships and celebrating an adopted child’s connections with all of the important people in their life;

⁵³ *L.M. v. The Children’s Aid Society of the Region of Peel, Office of the Children’s Lawyer*, 2019 ONSC 1566, 2019 CarswellOnt 4287 (Ont. S.C.J.) at para. 95.

⁵⁴ *L.M. v. Peel Children’s Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 81.

⁵⁵ Affidavit of Patricia Convery, sworn July 8, 2019.

⁵⁶ In *Children’s Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.), Ms. Convery was found to be litigation expert and the trial judge admitted her evidence that was similar to the evidence filed in *L.M. v. Peel Children’s Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.).

⁵⁷ Affidavit of Professor Michael Saini, sworn July 9, 2019.

- allowing the child to resolve losses with truth, rather than fantasy;
- enabling easier access to medical and other significant information about the birth family;
- easing feelings of abandonment and lessening loyalty conflicts;
- tending to be beneficial for birth parents, adoptive parents and children; and
- generally equating with better outcomes for children.

The Court of Appeal noted that the OCL's fresh evidence suggested that an access order would not, as a general matter, impair the children's adoption prospects. However, the Court found it unnecessary to rule on the admissibility of the evidence since the Society conceded that some form of access between the appellant and the children would be in their children's best interests.⁵⁸

In examining the judicial notice issue Justice Jamal, writing for the Court, found that the first appellate judge erred in using "common sense" and "informed experience" to hold that an access order would impair a child's opportunities for adoption. Justice Jamal also stated that courts are "not entitled to rely on findings made in other cases, such as the potential for having to deal with difficult birth parents and the deterrent effect an access order might have on some adoptive parents. Each case must be decided on its own facts, not based on findings made in other cases."⁵⁹

When the plan for a child is not to place them for adoption, the "impair adoption" factor is obviously not relevant in the analysis. It may also not be relevant when a prospective adoptive family is not yet known. As noted by the Honourable Justice Madsen:

There is no expectation at law that access will or must mirror anticipated openness provisions. This makes sense, as for many children, adoption prospects are, at the point of being placed in extended Society care, uncertain at best. In my view, the legislative amendments were designed to open up and liberalize post-extended Society care access rather than limit it, recognizing the importance of children's pre-existing relationships. The legislation permits a wide range of access, without any limits on frequency. That the legislation provides for a consideration of impairment of adoption "only where relevant", suggests a recognition that it will often *not* be relevant, such as where there is no identified prospective adoptive family which has taken a position against access and eventually openness.⁶⁰

When a Society plans to place a child for adoption, it is incumbent upon the agency to lead evidence about the plan and any information it has about the pool

⁵⁸ *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 8.

⁵⁹ *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at paras. 78-79.

⁶⁰ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 195.

of prospective adoptive parents and openness. In *Children's Aid Society of Toronto v. R.S.*, Justice Kiteley of the Ontario Superior Court of Justice highlighted this point and criticized the Society for not providing evidence about openness and adoption opportunities at the extended care trial. She relied on the decision in *Peel* to state that there is evidence that exists on this issue and stated that Societies should be providing it to the court.⁶¹

In looking at the “impair adoption opportunities” factor, courts have found that there are attributes of individuals seeking access that may impair a child’s opportunities for adoption or make face-to-face visits difficult:

- (a) The first attribute is a difficulty with aggression, anger or impulse control. Persons with this attribute are often confrontational. This attribute may threaten the physical or emotional security of the adoptive parents and their family.
- (b) The second attribute is a lack of support for an alternate caregiver of the child. This might manifest itself in an undermining of the adoptive placement and the child’s sense of security with the adoptive family. Persons with this attribute may be relentlessly critical of the adoptive parents and make their lives very difficult. They are usually unable to accept their reduced role in the child’s life.
- (c) The third attribute is dishonesty and secrecy. Persons with this attribute can often not be trusted to comply with the terms of court orders or to accurately report any important issues about the child.
- (d) The fourth attribute is a propensity to be litigious. Persons with this attribute are usually unable to accept a reduced role in the child’s life and are likely to engage in openness litigation.⁶²

Courts have also found that the absence of these attributes will constitute evidence in support of a position that access to that person would not impair a child’s future opportunities for adoption.⁶³ While a reasonable inference may be made in some cases that past behaviours demonstrate that an individual seeking access would disrupt or impede a potential adoptive placement, caution should be exercised when considering these “attributes.” Simply looking at past behaviour without context could lead to improper inferences being made. As noted by Justice Jamal in *Peel*, “each case must be decided on its facts.”⁶⁴ Two examples demonstrate this point:

⁶¹ *Children's Aid Society of Toronto v. R.S.*, 2020 ONSC 4993, 2020 CarswellOnt 12517 (Ont. S.C.J.) at para. 60 and footnote 12.

⁶² *Children's Aid Society of Toronto v. J.G.*, 2019 ONCJ 333, 2019 CarswellOnt 7791 (Ont. C.J.) at para. 98, reversed in part 2020 CarswellOnt 2318 (Ont. S.C.J.), reversed 2020 CarswellOnt 8820 (Ont. C.A.).

⁶³ *Children's Aid Society of Toronto v. J.G.*, 2019 ONCJ 333, 2019 CarswellOnt 7791 (Ont. C.J.) at para. 99, reversed in part 2020 CarswellOnt 2318 (Ont. S.C.J.), reversed 2020 CarswellOnt 8820 (Ont. C.A.).

⁶⁴ *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 79.

- (a) under attribute 1 (aggression, anger, impulse control), evidence that a parent was confrontational with one or two workers during the extended care trial when tensions were at their highest, or when the child was originally removed from their care, would likely not allow a court to determine that a parent in those circumstances would “threaten the physical or emotional security of the adoptive parents or their family.” This is particularly true if the parent was otherwise cooperative with the Society or foster parents and/or there happened to be unique personality conflicts between the worker and the parent;
- (b) under attribute 4, a person who exercises their right to defend against an application to remove a child from their care should not be deemed “litigious” in the sense that it leads to a finding that the person would impair a child’s opportunities for adoption. This can be contrasted with a parent who brings countless motions without merit and appeals every interim or procedural order in a case. It may be a reasonable inference that the parent who engages in the latter conduct would unreasonably and unnecessarily delay any openness proceedings. In those instances, courts have sometimes made the child the only “access holder” and the only person entitled to bring openness applications. This may alleviate some of a court’s concerns by allowing the child, rather than the parent, to decide whether to bring an openness application. When the child is placed for adoption, the child will presumably make that decision after consulting with their counsel and their potential adoptive family.⁶⁵

As noted above, the impair adoption opportunities factor must be considered with all the other relevant factors to determine whether access is in a child’s best interests. Further, even in those difficult cases where face-to-face access is found to be inappropriate because of a person’s behaviours, “the court must still consider all forms of access, ranging from regular face-to-face access to an exchange of gifts, cards, and letters that may be vetted by the children’s caregivers for appropriateness.”⁶⁶

This sentiment was also expressed in *JG* when Justice Benotto stated that “the *CYFSA* requires a new approach to determining access” and noted that access can come in many forms other than only in-person visits. She stated that “[t]he exchange of gifts, emails, video chats or phone calls are all forms of access. The form and frequency of access should be tailored to the child’s specific needs and age-appropriate wishes.”⁶⁷

In *Windsor-Essex Children’s Aid Society v. E.W.*,⁶⁸ the Court of Appeal for Ontario once again outlined the need to consider all forms of access when

⁶⁵ *Children’s Aid Society of Toronto v. U. (E.)*, 2014 ONCJ 299, 2014 CarswellOnt 8346 (Ont. C.J.) at paras. 260-262.

⁶⁶ *L.M. v. Peel Children’s Aid Society*, 2019 ONCA 841, 2019 CarswellOnt 17317 (Ont. C.A.) at para. 77.

⁶⁷ *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at para. 64.

assessing a claim for access. In *EW*, the trial judge found that he did not have evidence before him to support an access order. The Court of Appeal highlighted that the absence of evidence from a parent seeking access does not in itself justify denying access. The Court went on to review the record and found that there was at least *some* evidence to support an access order because the children's prospective adoptive parents indicated that they were not opposed to "photograph access." As a result, the Court granted the mother photograph access once per month. In doing so, the Court highlighted that such access would allow the children to maintain, even in a modest way, some connection through their birth mother with their Métis culture, heritage, and tradition. The court also noted that "[e]ven this very limited access could be significant to the appellant because it would entitle her to notice of the adoption proceedings and would keep the door open to some form of openness in the adoption."

Finally, the Honourable Justice Madsen summarized the general approach to access to children in extended care after conducting a review of existing case law. She noted that "[t]he direction now, to the extent possible and in the children's best interests, is to keep children connected with important people in their lives. The new approach is less rigid, more flexible, and focused on a holistic assessment of what is truly in children's best interests. *CAS v. J.G.*, 2020 ONCA 415; *Kawartha-Haliburton CAS v. W.(M.)*, 2019 ONCA 316; *M.(L.) v. Peel Children's Aid Society*, 2019 ONCA 841."⁶⁹

In looking at the new approach to access to children in extended care and openness, Justice Madsen highlighted that biological families and prospective adoptive families should work together on post-adoptive plans to ensure that children are surrounded by more, not less, love. In expressing this sentiment, she repeated a statement from Kenneth Richard, an Indigenous child welfare expert: **The goal should be to wrap children in a collection of adults who love them, rather than taking a mine/yours approach** [emphasis in original].⁷⁰

4. ACCESS FOR FIRST NATIONS, INUIT AND MÉTIS CHILDREN

For FNIM children in extended care, there are unique considerations under the *CYFSA* that courts must consider in determining access. There are also additional considerations under the *Federal Act*.⁷¹ Both pieces of legislation have provisions that reinforce the importance of children maintaining

⁶⁸ *Windsor-Essex Children's Aid Society v. E.W.*, 2020 ONCA 682, 2020 CarswellOnt 15752 (Ont. C.A.) at paras. 53-54 and 64, leave to appeal refused 2021 CarswellOnt 7363, 2021 CarswellOnt 7364 (S.C.C.).

⁶⁹ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 184.

⁷⁰ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at paras. 257-258.

⁷¹ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, which came into force on January 1, 2020.

relationships with their birth families and their communities. The *Federal Act* establishes national standards for child and family services related to FNIM children, and it also allows Indigenous groups, communities, and peoples to enact their own laws that will prevail over federal and provincial legislation, subject to limited exceptions.^{72 73}

(a) CYFSA Considerations

In enacting the *CYFSA*, the Legislature committed to working with FNIM peoples “to help ensure that wherever possible, they care for their children in accordance with their distinct cultures, heritages and traditions.” It also recognized that FNIM “children should be happy, healthy, resilient, grounded in their cultures and languages and thriving as individuals and as members of their families, communities and nations.”⁷⁴ In making determinations in relation to the best interests of an FNIM child, including access decisions, courts are required to consider the importance of preserving the child’s cultural identity and connection to community, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions.⁷⁵

In *Kawartha*, the Court of Appeal recognized the importance of the legislative changes dealing with FNIM children and families. The Court noted that the new provisions usher in a series of “special considerations including the provision of services and decisions that recognize the importance of the child’s culture, heritage, and connection to community.” The Court noted that “[t]he

⁷² *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, ss. 20-24.

⁷³ At the request of the Quebec government, the Court of Appeal of Quebec issued an opinion on the constitutionality of the *Federal Act: Renvoi à la Cour d’appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, 2022 CarswellQue 1157 (C.A. Que.). It found that the national standards for child and family services were constitutional and applied to all FNIM children in Canada. It also found that FNIM people have an inherent right to self-government related to child and family services and that Parliament was within its bounds to recognize that right. However, the Court found that Parliament does not have the authority to deem the laws enacted by Indigenous Peoples to have the effect of federal legislation such that the doctrine of paramountcy applies to oust the laws of the province. Provincial laws may still be ousted, however, where they do not comply with the *R. v. Sparrow* framework under section 35 of the *Constitution Act, 1982 (Aboriginal Rights)*. The Federal government on March 14, 2022, announced that it would appeal the Quebec Court of Appeal’s conclusion that two sections of the Act are invalid namely: 1. s. 21 which gives federal force to Indigenous laws that meet the conditions set out in the Act; and 2. s. 22(3) which provides that Indigenous laws are paramount over conflicting provincial legislation. See: <https://www.canada.ca/en/indigenous-services-canada/news/2022/03/the-government-of-canada-appeals-the-quebec-court-of-appeals-opinion-on-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families.html>.

⁷⁴ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, Preamble.

⁷⁵ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, 74(3).

special considerations that apply to Indigenous children must be part of every decision involving Indigenous children.” Further, the Court confirmed that it was an error not to specifically consider whether an order granting access to the children’s mother would assist the children in preserving their cultural identity.⁷⁶

In *EW*, the Court of Appeal also highlighted the importance of a child’s connection to their Indigenous culture, heritage, and tradition when it ordered limited access to a child’s mother where there was limited evidence to support an access order. The Court noted that such access “would allow the children to maintain, even if in a very modest way, some connection through their birth mother with their Métis culture, heritage, and tradition, a statutory factor the court must consider in making a determination in the best interests of the children.”⁷⁷

(b) The *Federal Act* (National Minimum Standards)

The *Federal Act* came into force on January 1, 2020 and provides minimum standards for child and family services for FNIM children and families. In *Kina Gbezhgomi Child and Family Services v. MA*, Justice Wolfe highlights the importance of the application of the federal legislation in child welfare:

Indigenous families have felt the negative and sometimes fatal impacts of colonization most acutely in the dismantling of Anishinaabe laws and kinship structures. This intentional disruption to the transmission of culture was achieved through the removal of Indigenous children into the residential school system, and now through the disproportionate removal of Indigenous children from their families through the child welfare system [. . .] This overrepresentation is well known, and I am entitled to take judicial notice of not only the statistics in relation to this, but also the alienation, disempowerment and frustration that Indigenous families and communities feel when it comes to child welfare.

This history is what prompted not only the preamble and remedial sections of the *CYFSA*, but also the most recent federal legislation in Bill C92, *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, S.C. 2019, c.24 which came into force in January 1, 2020. Both Acts instruct the courts on the need to approach child welfare differently when dealing with Indigenous families, and with a view to recognizing the importance of continuity of culture and family. This is, as the preamble of the *CYFSA* instructs, to be done “in the spirit of reconciliation. . . working with First Nations, Inuit and Métis peoples to help ensure that wherever possible, they care for their

⁷⁶ *Kawartha-Haliburton Children’s Aid Society v. M.W.*, 2019 ONCA 316, 2019 CarswellOnt 5927 (Ont. C.A.) at paras. 59-60 and 80.

⁷⁷ *Windsor-Essex Children’s Aid Society v. E.W.*, 2020 ONCA 682, 2020 CarswellOnt 15752 (Ont. C.A.) at para. 54, leave to appeal refused 2021 CarswellOnt 7363, 2021 CarswellOnt 7364 (S.C.C.).

children in accordance with their distinct cultures, heritages, and traditions.

Under the *Federal Act*, there are many statutory provisions that support the maintenance of a child's relationships with their family and communities. Some of these provisions include:

- In the Preamble, it states that Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices. It further recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of child and family services;⁷⁸
- The *Federal Act* is to be interpreted and administered with the principle of cultural continuity as reflected in the following concepts:
 - o cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
 - o the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
 - o a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;
 - o child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and
 - o the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.⁷⁹
- A primary consideration in assessing an FNIM child's "best interests" is the importance of the child "having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture."⁸⁰
- The best interests factors include consideration of the child's cultural, linguistic, religious and spiritual upbringing and heritage, and the importance to the child of preserving the child's cultural identity and

⁷⁸ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, Preamble.

⁷⁹ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s 9(2).

⁸⁰ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s 10(2).

connections to the language and territory of the Indigenous group, community or people to which the child belongs;⁸¹

- The best interests factors must be construed, to the extent that it is possible to do so, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.⁸² In this respect, for example, if it is a custom or law of an Indigenous group, community or people to ensure that a child always maintains a relationship with their birth parents, extended family and community members, this will be an important consideration when a court is making best interests determinations, including access determinations;
- Child and family services are to be provided in a manner that takes into account the child's culture and allows the child to know his or her family origins;⁸³
- In the context of providing child and family services to an FNIM child, there must be a reassessment, conducted on an ongoing basis, of whether it would be appropriate to place the child with his or her parents or another adult in the child's family;⁸⁴ and
- If a FNIM child cannot be placed with family, the child's attachment and emotional ties to the child's family must be promoted to the extent that doing so is consistent with the best interests of the child.⁸⁵

These provisions indicate a strong legislative preference for FNIM children to maintain connections with their families and communities wherever possible. The importance of these connections has also been confirmed and expressed by courts. For example,

- In *The Children's Aid Society of Ottawa v. L.A.*,⁸⁶ Justice Somji applied both the *Federal Act* and the *CYFSA* in granting access to an Inuk child's mother and father. In making the orders, she recognized the importance of family connections under both Acts. Despite the plan for the child to be adopted by an Inuit family, Justice Somji stated that the child's "connection to his Inuit culture, language, and history will likely be enhanced if he is also able to maintain contact with his mother and birth family." She also granted access to the child's father who expressed

⁸¹ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s 10(3).

⁸² *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s 10(4).

⁸³ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s. 11.

⁸⁴ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s. 16(3).

⁸⁵ *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s. 17.

⁸⁶ *The Children's Aid Society of Ottawa v. L.A.*, 2022 ONSC 387, 2022 CarswellOnt 382 (Ont. S.C.J.).

interest in access, but who had not been involved in the child's life. Despite the lack of contact between the child and his father, Justice Somji found that the child "is still an infant and there is time for him to develop some form of relationship with his biological father should that be possible. [An access order] provides him an opportunity to be exposed to teachings and practices of his Inuit culture, including possibly time on the land in Nunavut, from the perspective of his father and paternal family";⁸⁷ and

- In *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, Justice Madsen highlighted that the "new access provisions of the *CYFSA* must be read harmoniously with other provisions within legislation which emphasize the importance of preserving indigenous children's cultural identity and connection to community (s. 74(3)(b))." She recognized that the access provisions should also be "interpreted in the spirit of the acknowledgments set out in the Preamble, including that indigenous children should be grounded in their cultures and thriving both as individuals and members of their families." Finally, she found that FNIM children's "ongoing connections to family members must now, where in their best interests, be seen as an important aspect of promoting and maintaining indigenous identity and connection."⁸⁸

5. LEGAL ISSUES RELATING TO CHILDREN IN EXTENDED CARE

(a) Access at the Discretion of a Children's Aid Society

Historically, there has been a debate about whether courts can or should delegate access decisions to Societies. The tension often arose when courts had difficulty crafting appropriate terms for access given concerns about a parent's behaviours or unknowns about the future. Some examples include where the amount of access might be dependent upon a parent's recovery from addictions or mental health issues or where a child requires counselling before resuming access with a parent due to historical abuse. It could also arise where a child wants to have an access relationship with a parent, but the parent cannot be located.

In a 2003, the Divisional Court in *H. (C.) v. Children's Aid Society of Durham (County)* considered whether a lower court erred in making a temporary access order "to be supervised at the discretion of the Society." The Court determined that the court "has authority to make an access order and as a term or condition to leave the day-to-day supervision, monitoring and decision-making to the Children's Aid Society."⁸⁹

⁸⁷ *The Children's Aid Society of Ottawa v. L.A.*, 2022 ONSC 387, 2022 CarswellOnt 382 (Ont. S.C.J.) at paras. 132-144.

⁸⁸ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 185.

As *H(C)* was a decision relating to a temporary order, courts took different approaches in determining whether there is authority to delegate access decisions to a Society when making final orders:

- Some judges found that there is authority for judges to make access orders to be exercised “at the discretion” of a Society;⁹⁰
- Some judges found that, at least on a final basis, there is no jurisdiction, either expressly or by implication, for the court to delegate its authority to make orders in respect of access to any person or entity, including the Society;⁹¹
- Other judges took a slightly different approach and found that courts should rarely delegate access decisions to the Society. Justice Sherr noted that “[o]rders of access in the discretion of the society should not be routinely made, especially on a final basis, as it is essentially a delegation of the court’s responsibility to decide the issue.” Further, in *Children’s Aid Society of Toronto v. T. (C.)*, Justice Spence stated that courts should be “loath to delegate” their authority over access decisions to Societies or third parties. However, he recognized that some cases require “maximum flexibility”, and it may be appropriate to delegate some decisions regarding access in those situations.⁹²

Recently, the Divisional Court in *J.S.R. v. Children’s Aid Society of Ottawa*⁹³ determined that it is an error of law to grant a Society the discretion to determine the type, frequency, and duration of access, including whether access will take place at all, under sections 104 and 105 of the *CYFSA*. The Court found that these sections of the *Act* obligate the court to impose terms and conditions on access and nothing in the language of these sections explicitly or implicitly allows the court to delegate these decisions to the Society or any other person. The Court found that minimum access rights must be established and that the delegation of all elements of access including the type, frequency, and duration of access to a Society offends the principle against sub-delegation as outlined by the Supreme Court of Canada in *AG Canada v. Brent*.⁹⁴

⁸⁹ *H. (C.) v. Children’s Aid Society of Durham (County)*, 2003 CarswellOnt 965 (Ont. Div. Ct.) at paras. 20-21, leave to appeal refused 2003 CarswellOnt 6539 (Ont. C.A.).

⁹⁰ *L.R. v. Children’s Aid Society et al*, 2020 ONSC 4341, 2020 CarswellOnt 10167 (Ont. S.C.J.) at paras. 78-93, appeal quashed *L.R. v. Children’s Aid Society of Toronto*, 2021 CarswellOnt 1409 (Ont. C.A.); *Y. (K.B.) v. Children’s Aid Society of Algoma*, 2003 CarswellOnt 4955 (Ont. S.C.J.) at para. 9.

⁹¹ *C.A.S. v. K.D.D.*, 2020 ONSC 511, 2020 CarswellOnt 1592 (Ont. S.C.J.) at paras. 39-45; *Children’s Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 922 (Ont. S.C.J.) at para. 40, reversed 2005 CarswellOnt 4579 (Ont. C.A.).

⁹² *Catholic Children’s Aid Society of Toronto v. C.B.*, [2007] O.J. No. 3573 (Ont. C.J.) at para. 55; *Children’s Aid Society of Toronto v. T. (C.)*, 2003 CarswellOnt 746 (Ont. C.J.) at paras. 34-36.

⁹³ *J.S.R. v. Children’s Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.).

⁹⁴ *AG Canada v. Brent*.

In making its determination, the Divisional Court distinguished the Court's previous decision in *H(C)* where a different panel of the Divisional Court found it was permissible to delegate the "day to day" decision-making to the Society. The Court in *JSR* found that *H(C)* was distinguishable because it was an appeal of a temporary order rather than a final order.⁹⁵ Interestingly, the Court explained the differences between temporary and final orders (i.e., a temporary order is only intended to be in place until a trial, and a final order is intended to decide the rights of the parties without further litigation). It did not, however, explain how the statute implicitly allowed for discretionary access decisions to be delegated to a Society under section 94 of the *Act* (temporary orders). It also did not explain how the delegation of temporary access decisions does not offend the rule against sub-delegation.

The Divisional Court also distinguished the Court of Appeal's decision in *JG* where the Court reinstated a trial judge's decision that left some decision-making around access to be at the discretion of the Society. The Divisional Court found that there is a "fundamental difference" between the decisions *JG* and *JSR*: the trial judge in *JSR* delegated *all* decision-making for access to the Society while Justice Sherr in *JG* significantly circumscribed the discretion of the Society as to form, duration, and frequency by setting minimum access rights. While Justice Sherr granted the mother access at the discretion of the Society, he ordered that the mother have a minimum of six visits each year for at least one hour each and that the mother would also receive a recent picture of the child 4 times each year.⁹⁶

Following the *JSR* decision, the Divisional Court released another decision dealing with the delegation of access. In *D.M. v. The Children's Aid Society of Ottawa*,⁹⁷ the Court dismissed an appeal of a final order under section 102 of the *CYFSA* granting custody of the children to the father and granting access to the mother "at the discretion" of the father. Justice Perell, writing for the majority⁹⁸, found that an order delegating access decisions to the father pursuant to a custody order under section 102 of the *CYFSA* did not offend the rule against sub-delegation in *JSR* because the mother can bring an application to vary the access order under section 21 of the *Children's Law Reform Act*

⁹⁴ *J.S.R. v. Children's Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at paras. 48-51.

⁹⁵ *J.S.R. v. Children's Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at para. 45.

⁹⁶ *J.S.R. v. Children's Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at paras. 46-47.

⁹⁷ *D.M. v. The Children's Aid Society of Ottawa*, 2021 ONSC 8360, 2021 CarswellOnt 19418 (Ont. Div. Ct.).

⁹⁸ Justice Kristjanson, who was also on the Divisional Court panel in *JSR*, wrote her own judgment but concurred on the result and agreed with Justice Perell's reasons related to delegating access.

("CLRA"). The Court found that this was "unlike an extended care order, which terminates the court's involvement."⁹⁹

Allowing discretionary orders when a custody order is made, and not when an extended care order is made, on the basis of the availability of a review mechanism is difficult to understand. This is because sections 104 and 105 of the *CYFSA* also allow for an application to vary an access order made for a child in extended care. Under section 104, the court can "make, *vary*, or terminate a person's access to a child" and section 105(7) specifically contemplates a variation of access for children in extended care.¹⁰⁰ While the review mechanisms under the *CLRA* and the *CYFSA* are slightly different, both allow for variation of access orders after certain criteria are met.

The Divisional Court's distinction may need further clarification or refinement in future cases. Until then, it is not permissible to delegate all access decisions to a Society when an extended care order is made, but it is permissible to leave access at the discretion of one parent when the court makes a section 102 custody order.

An interesting question that remains after *JSR* and *DM* is whether access orders made under section 104 allow for delegation of access decisions to Societies where a final supervision order or a final interim Society care order is made. In both those situations, the orders are "final", but they are time-limited (up to 12 months), and the court is required to review the child's status prior to the expiry of the orders. Given the rationale in *DM* that the delegation is permissible where the access order "is subject to the ongoing supervision of the court,"¹⁰¹ it is likely that it would only be interpreted to apply to access orders made after an extended care order is made. It is, however, difficult to reconcile this with the Court's statement in *JSR* that there is nothing in the language of section 104 that "either explicitly or implicitly includes the power to sub-delegate the decision as to terms or conditions of access to a nonjudicial actor such as a Society"¹⁰² given that access orders for final supervision orders and interim Society care orders are also made pursuant to the same section.

There is currently divided case law on whether a discretionary access order can be made under section 104 of the *CYFSA* alongside a final supervision order. In two decisions, Justice Bondy followed *JSR* when making final supervision orders.¹⁰³ Justice Piccoli found that the case before her was distinguishable from

⁹⁹ *D.M. v. The Children's Aid Society of Ottawa*, 2021 ONSC 8360, 2021 CarswellOnt 19418 (Ont. Div. Ct.) at paras. 259-264.

¹⁰⁰ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, ss. 104, 105.

¹⁰¹ *D.M. v. The Children's Aid Society of Ottawa*, 2021 ONSC 8360, 2021 CarswellOnt 19418 (Ont. Div. Ct.) at paras. 261-264.

¹⁰² *J.S.R. v. Children's Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at paras. 49-51.

¹⁰³ *Family and Children's Services of Guelph and Wellington County v. P.C.*, 2021 ONCJ 409, 2021 CarswellOnt 11168 (Ont. C.J.); *Family and Children's Services of Guelph and Wellington County v. C.R.*, 2021 ONCJ 461, 2021 CarswellOnt 12403 (Ont. C.J.).

JSR because she was making a final supervision order and not an extended care order. She still granted minimum access rights in the form of a written letter once per month.¹⁰⁴ Further, Justice Walters considered *JSR* in the context of a supervision order and she acknowledged the Divisional Court's finding that minimum access rights must be established by the courts. She found that she did not need to set minimums for access since the child is a teenager and is choosing when he wishes to see his mother. The access order she made was that access shall be at the discretion of the Society and in consultation with the child.¹⁰⁵

In our view, the rule against sub-delegation does not adequately explain the current distinctions in the case law around when a court has authority to delegate access decisions. A better way forward would be for courts to adopt the approach taken by Justice Spence in *Children's Aid Society of Toronto v. T. (C.)*. Justice Spence recognized that the court should be "very loath to delegate" decision-making around access to Societies, but some cases require maximum flexibility where delegation of some decisions may be appropriate. He noted:

I do agree that courts should be very loath to delegate this authority to third persons. It is the courts, and not third parties, who are vested with the legal decision-making for access to children. I do not suggest that the society would act capriciously or in bad faith. However, a children's aid society is nothing more than an amalgam of individuals, some better than others, some more experienced than others and some wiser than others.

So, what is the solution where "maximum flexibility" is required? No doubt, there will be those cases of the kind that Justice Perkins had before him where some degree of discretion is required. It would be next to impossible, in certain instances, for the parties to have to keep returning to court to request different terms and conditions. Apart from anything else, the cost, particularly for parents, would be prohibitive. Perfect access to justice exists only in a perfect world. Regrettably, that is not the world in which we live. It is that very cost of access to justice that has resulted in so much self-representation in our courts in the past number of years.

Perhaps a more realistic judicial approach would be to recognize, in those "maximum flexibility" cases, that the court does indeed have jurisdiction to delegate certain decision-making authority to third parties, including children's aid societies. In my opinion, this can be justified under the *parens patriae* jurisdiction of the superior courts or under the over-arching principles set out in section 1 of the Child and Family Services Act — the promotion of the "best interests, protection

¹⁰⁴ *Children's Aid Society of the Regional Municipality of Waterloo v. D.B. and B.M.*, 2021 ONSC 5252, 2021 CarswellOnt 10926 (Ont. S.C.J.) at paras. 212 and 215.

¹⁰⁵ *Children's Aid Society of the Regional Municipality of Waterloo v. C.F. and R.A.*, 2021 ONSC 6158, 2021 CarswellOnt 13154 (Ont. S.C.J.) at paras. 98-99, 117 and 119-120.

and well being of children”. I have read a number of cases supporting the concept of no-delegation and I have been unable to find a principled legal rationale set out in any of those cases that would “trump” either “best interests” or *parens patriæ*. I emphasise, however, that discretionary orders should be sparingly used and only in appropriate fact situations.

This reasoning is practical and can be applied to all access decisions, whether they be temporary or final, and regardless of the type of review mechanism in place for the access order. It would also make courts accountable for the delegation by requiring them to identify and justify why the specific delegation is appropriate in the “rare” circumstances of the case. This approach also recognizes the many reasons why it should be a rare occurrence for courts to delegate access decisions to a Society, including:

- a) from a rights or entitlements perspective, an access order that leaves all access to be at the discretion of a Society does not allow for enforcement of access by the child or the person named in the access order.¹⁰⁶ This can be problematic from a child’s perspective because there is no assurance that access will occur when it is left up to the discretion of individual child protection workers; and
- b) from a practical perspective, Societies are made up of individuals who may differ in their views about the importance of access for an individual child. Children’s workers may change over time and access for a child could be inadvertently missed. Priority may also be given to facilitating access orders for other children that have specified and binding access orders that must be followed. The bottom line is that when a court order is in place requiring a minimum amount of access to occur, it makes access more likely to happen.

In cases where it is difficult to craft orders with much specificity due to concerns about the behaviour of a person or where there are unknowns about the future, terms and conditions can usually be crafted to deal with most situations. For example:

- A parent may frequently miss visits due to their personal circumstances despite being an important person in the child’s life. It can be disappointing for a child to attend missed visits and there is no way to force a parent to attend access. As noted by Justice L’Heureux Dube in *Young v. Young*, “it must not be forgotten that a parent who is granted access has no obligation to exercise those rights, and neither the child nor the custodial parent can force an access parent to comply with such an order, even though access might have been determined to be in the best interests of the child.”¹⁰⁷ To address the issue of frequently missed visits

¹⁰⁶ These types of access orders may still have some benefit to a child in extended care because “access holders” and access “recipients” will have a right to receive notices when the child is placed for adoption and any “access holder” may bring an openness application.

by a parent, a court could include a term that there be a minimum number of access visits (e.g. once or twice per week), but the parent must confirm that he or she will attend the visit a certain number of days and/or hours before the access visit is scheduled to occur;

- In situations where parents have a history of attending access visits intoxicated, a term could be inserted that the parent shall not attend access visits while under the influence of alcohol or impaired by drugs;
- If a parent cannot be found, the access can be scheduled for minimum periods of time if the parent contacts the Society to arrange such visits; or
- If a parent lives in another province or country and it is not feasible for the child to travel for access, access can be scheduled by other means (e.g. video calls, emails, letters, etc.). There could also be a provision for in-person access visits if, and when, the parent is in the geographic location where the child resides.

Practically speaking, it is not difficult for courts to specify minimum terms and conditions to satisfy the rule in *JSR*, but this should not be the sole focus of the access analysis. Rather, courts should strive to make orders that specify an access schedule that is in each individual child's best interests. As Justice Benotto noted in *JG*, "[t]he form and frequency of access should be tailored to the child's specific needs and age-appropriate wishes."¹⁰⁸

It is interesting that litigants and courts spend an enormous amount of time and effort crafting detailed parenting-time orders in parenting time and decision-making cases, but often little time or effort is spent on specifying detailed terms and conditions for access in cases where a child is placed in extended care. For children who are no longer able to live with their family, access orders can be an extremely important way for them to maintain important connections. In this spirit, litigants should be providing evidence to courts about the amount and type of access that each child wants and needs. This will allow courts to make specific access orders "tailored to the child's specific needs and age-appropriate wishes."

(b) Confusion Around "no access", "no contact" and "silent as to access"

There has been confusion over the years between "contact" and "access" under the *CYFSA* and its predecessor legislation. One question that has repeatedly arisen is whether a Society can allow "contact" between a child and another individual when a claim for access to that individual is specifically dismissed by the court. Some thought that a "no access" order or an order "without access" meant that a Society could not allow any contact between a child and that person.

¹⁰⁷ *Young v. Young*, 1993 CarswellBC 1269, 1993 CarswellBC 264 (S.C.C.) at para. 68.

¹⁰⁸ *Children's Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.) at para. 64.

The confusion often arose based on the wording of orders when courts decided not to grant access rights for a child in extended care. Different courts used different language when making the determination, including: “no access order is made”, “there shall be no access” or “the child is placed in extended care without access.” Some viewed this wording as not allowing any contact between a child and the individual who was denied an access order. However, this is incorrect as it conflates “access” and “contact.”¹⁰⁹

As noted above, access to a child in extended care is a “right” or “entitlement” that is enforceable against the Society. When a child is placed in extended care, the court either “makes” an access order for a child under section 104 of the *CYFSA* or it dismisses a person’s claim for access.¹¹⁰ In this sense, the court either grants “rights” of access or it does not grant such rights. The “access” provisions under the *CYFSA* do not dictate every individual with whom the child will spend time or communicate. These “contact” decisions are left to the Society as the child’s statutory parent.¹¹¹ There is nothing in section 104 (or its predecessor section under the *CFSA*) that allows a court to order “no contact” or specifically removes the discretion of Societies from allowing any person to have contact with a child in extended care if the Society believes that such contact is in the best interests of the child. If a court specifically intends to order “no contact” between a child and another individual, there are separate provisions in the *Act* that allow this type of order to be made.¹¹²

These issues were addressed by the Court of Appeal in *Children’s Aid Society of Toronto v. P. (D.)*¹¹³ in 2005. At the time of the decision, the *CFSA* did not allow a child to be placed for adoption when there was an access order in place. In situations where courts found that there may be benefits for an adoptable child to have contact with people who were important to the child pending their adoption, courts would sometimes make an order “silent as to access” to avoid making an access determination. This was done because some judges took the view that if they determined that the child could not have “access” to a parent or other person, this meant that the child could no longer have any “contact” with them even if the Society determined that such contact was in the best interests of the child.

In *DP*, the Court of Appeal clarified that an order that is “silent as to access” is not available under the *CFSA*. Courts must either grant a right of access or dismiss an application for access if the statutory test is not met. It cannot avoid making the determination by being “silent as to access.” The Court noted,

¹⁰⁹ *Family & Children’s Services of Lennox & Addington v. S. (M.)*, 2005 CarswellOnt 7081 (Ont. S.C.J.) at paras. 7-10; *Children’s Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 4579 (Ont. C.A.) at paras. 8-12.

¹¹⁰ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, s. 104.

¹¹¹ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, s. 105(9).

¹¹² *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, s. 137.

¹¹³ *Children’s Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 4579 (Ont. C.A.).

however, that Societies have the right as statutory parents to control who may visit children in foster care or even children placed for an adoption that has not been made final. The Court stated that Societies retain this right “even where an order stipulates that a parent has no legally enforceable right of access.” The only exception to the Society’s authority would be if the court made a “no contact” order.^{114 115}

After this decision, the authority of a Society to allow contact or communication with a child who was a Crown ward in the absence of an access or openness order was codified in *CFSA*.¹¹⁶ This provision remains under the *CYFSA* at subsection 105(9):

Society may permit contact or communication

(9) If a society believes that contact or communication between a person and a child who is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c) is in the best interests of the child and no openness order under Part VIII (Adoption and Adoption Licensing) or access order is in effect with respect to the person and the child, the society may permit contact or communication between the person and the child.¹¹⁷

Despite the *DP* decision and the 2006¹¹⁸ introduction of the “contact” provision in child protection legislation, requests for “silent as to access” orders continued to arise periodically in child protection cases. These requests were made because of a mistaken belief that a Society will lose its discretion to allow “contact” between a child and a parent or individual seeking access if the court decides not to make an access order. For example, in *Frontenac Children’s Aid Society v. B. (E.)*, the court stated: “the Order shall be silent as to access for the father, as an Order expressly stating no access to the father would prevent the Society from allowing contact with the father pursuant to section 59(4) of the *Act*.”¹¹⁹ Further, in *Children’s Aid Society of Sudbury & Manitoulin (Districts) v. G. (S.)*, the court stated that an order for Crown wardship which is silent as to access means that “the parties are free to negotiate access, up to the point of an adoption.”¹²⁰ There was no reference to *DP* in either of these decisions.

¹¹⁴ *Children’s Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 4579 (Ont. C.A.) at paras. 11-12.

¹¹⁵ At the time of the *DP* decision, the court’s authority for making a “no contact” order was found at section 80 of the *CFSA*. The “no contact” provision is now found at section 137 of the *CYFSA*.

¹¹⁶ *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*repealed*), s. 59(4), *Child and Family Services Statute Law Amendment Act, 2006*, SO 2006, c 5, s. 17(2).

¹¹⁷ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched 1, s. 105(9).

¹¹⁸ *Child and Family Services Statute Law Amendment Act, 2006*, SO 2006, c 5, s. 17(2).

¹¹⁹ *Frontenac Children’s Aid Society v. B. (E.)*, 2012 ONSC 916, 2012 CarswellOnt 2063 (Ont. S.C.J.) at para. 50.

Many other courts have followed *DP* and refused to make orders “silent as to access.”¹²¹ In other cases, judges have stated that “silent as to access” is appropriate, but it is clear from the decision that they rejected the claim for access (i.e. dismissed the claim) and simply did not make an access order.¹²² This is different than refusing to determine the issue of access altogether (i.e. either granting a right of access or dismissing the claim). There is no practical difference between a court not making an access order because it dismissed the claim for access and a court stating that the order is made with “no access” or “without access.”

In *Children’s Aid Society of London and Middlesex v. S. (M.)*, Justice Robertson provides a helpful clarification of the confusion between “access” and “contact” when determining access rights. In a case dealing with access under the former *CPSA*, she stated:

Unless an order for access is made, a crown ward is not entitled “as of right” to have family contact. Of course, the Society, as custodian, has an option to permit other contact.

An order for “no access”, or silent as to access or for minimal access still permits the Society to allow contact with the parents or whoever else they, as custodians, determine the children should include in their lives. As a matter of practice or policy, Societies interpret “no access” orders as prohibitive of contact. This is incorrect.¹²³

Justice Robertson made an access order and highlighted that access rights are minimum access rights and that “the Society, as custodian, may increase or expand access as they consider in the children’s interests.”¹²⁴ This is consistent with the Divisional Court’s decision in *JSR* where the Court stated: “if the access order stipulates in-person visits six times a year for an hour, a society retains the

¹²⁰ *Children’s Aid Society of Sudbury & Manitoulin (Districts) v. G. (S.)*, 2011 ONSC 4443, 2011 CarswellOnt 7178 (Ont. S.C.J.) at para. 48.

¹²¹ See *Children’s Aid Society of Simcoe (County) v. C. (T.)*, 2012 ONSC 5093, 2012 CarswellOnt 12192 (Ont. S.C.J.) at paras. 35-39; *Children’s Aid Society of Toronto v. H.S.*, 2019 ONCJ 729, 2019 CarswellOnt 16961 (Ont. C.J.) at paras. 103-104; and *The Children’s Aid Society v. S.P. and K.L.*, 2019 ONSC 5624, 2019 CarswellOnt 15382 (Ont. S.C.J.) at paras. 67-69.

¹²² *Children’s Aid Society of London and Middlesex v. L. (L.)*, 2015 ONSC 2448, 2015 CarswellOnt 6074 (Ont. S.C.J.) at paras. 55-64; *Children’s Aid Society of London and Middlesex v. S. (M.)*, 2016 ONSC 3217, 2016 CarswellOnt 16646 (Ont. S.C.J.) at paras. 154-159; *Kawartha-Haliburton Children’s Aid Society v. R. (J.)*, 2015 ONSC 2054, 2015 CarswellOnt 5594 (Ont. S.C.J.) at paras. 331, 339, 342 and 344, affirmed 2016 CarswellOnt 3309 (Ont. Div. Ct.).

¹²³ *Family & Children’s Services of Lennox & Addington v. S. (M.)*, 2005 CarswellOnt 7081 (Ont. S.C.J.) at paras. 7-10.

¹²⁴ *Family & Children’s Services of Lennox & Addington v. S. (M.)*, 2005 CarswellOnt 7081 (Ont. S.C.J.) at paras. 10 and 28.

discretion to grant additional visits, or to supplement in-person visits with additional written communication.”¹²⁵

Finally, in *D. (D.) v. Children's Aid Society of Toronto*, the Court of Appeal for Ontario once again clarified that where an order is made for a child to be placed in extended care “without access,” the Society is not prevented from exercising its discretion under section 105(9) to allow contact or communication with the individual whose access claim was dismissed.¹²⁶

Much of the confusion around “no contact” and “no access” could be avoided if litigants and courts used language that clearly identifies the intent of the order being sought or made. For example, if there is a claim for access and the court is dismissing the claim, rather than stating “there shall be no access”, the court could state: “the claim for access is dismissed” or “no access order is being made.” If, on the other hand, the court intends to make an order restricting a child’s contact with a person, section 137 should be specifically referenced. In these circumstances, the court could state: “there shall be no contact between X and the child pursuant to section 137 of the *Act*.” This type of language would clarify the intent of the orders being made and lessen the confusion for litigants and Societies.

Finally, confusion can also be created when courts make orders requiring a child to have “contact” with individuals rather than “access.” The OCL has seen these orders and they are typically done on consent. They appear to be made with the intent to allow contact while restricting the ability of the child or other individual to bring openness applications if the Society intends to place the child for adoption. The rationale appears to be that if a “contact order” is made rather than an “access order”, the requirement to give notices of an intention to place a child for adoption to “access holders” and “access recipients” will not be triggered.

There are several problems with this approach. First, at the extended care stage of the proceedings, the court only has authority to order “access”. It has no authority to grant rights or entitlements to “contact.” The Legislature has given Societies the exclusive discretion to allow “contact” to a child in extended care in the absence of an access or openness order or openness agreement. In this respect, a court order granting a right to have “contact” would likely be interpreted as an “access order” that triggers the openness provisions since those are the only orders that a court is authorized to make.

Section 191 of the *CYFSA* illuminates another problem with “contact” orders. Before a child is placed for adoption, the openness provisions are triggered, and section 191 terminates every order respecting a person’s “access” to the child once the child is placed for adoption. However, the *CYFSA* does not

¹²⁵ *J.S.R. v. Children's Aid Society of Ottawa*, 2021 ONSC 630, 2021 CarswellOnt 982 (Ont. Div. Ct.) at para. 55.

¹²⁶ *D. (D.) v. Children's Aid Society of Toronto*, 2015 ONCA 903, 2015 CarswellOnt 19491 (Ont. C.A.) at paras. 15 and 44, leave to appeal refused 2016 CarswellOnt 7210, 2016 CarswellOnt 7211 (S.C.C.).

state that “contact” orders terminate upon a child’s placement for adoption. If “contact” orders were authorized under the *Act*, this would suggest that such orders would survive adoption placements since there is no provision that automatically terminates them. This would be an absurd result that would subvert the detailed openness provisions in the *Act*.

In summary, the following principles should be kept in mind when distinguishing between access orders and contact:

- when a court is considering whether to grant access to a child in extended care under sections 104 and 105 of *CYFSA*, the court may either make orders for access or decline to do so in the child’s best interests. In this sense, the court either grants entitlements or rights to access or it does not;
- Regardless of the wording used for not granting rights of access (i.e. “extended care without access”, “extended care, no access”, “there shall be no access” or “no access order is made”), this generally means there is no *right* or *entitlement* being given to the child or the person seeking access.
- Where no access rights or entitlements are granted, the Society can continue to allow contact or communication between the child and the individual if it feels such contact or communication is in the best interests of the child;
- If the court intends to interfere with the discretion of a Society as the child’s statutory parent to allow contact or communication with a person, it must invoke section 137 of the *Act* and make a “no contact” order. In such cases, notice of the proceeding (and presumably the specific claim) is required to be given to the individual before the order is made; and
- While the court has the authority to make “access orders” and “no contact orders”, it cannot make positive “contact orders.”

(c) Access as a Gateway to Openness and the Meaning of “access holder” and “access recipient”

Courts are required under the *CYFSA* to specify whether a person named in an access order is an “access holder” or an “access recipient.” An access holder is any person who is granted a right of access and an access recipient is a person with respect to whom access has been granted. While there must be at least one person who is granted “rights of access”, it does not have to be limited to one person. Any or all the individuals named in the access order (including the child) could be made “access holders” with corresponding rights of access.

The distinction between “access holders” and “access recipients” becomes particularly important when a child is being placed for adoption. Once a child is placed for adoption, any access orders respecting the child are terminated. However, before the child is placed for adoption, the Society must give notice of an intent to place a child for adoption to all access holders and recipients. Access holders, but not access recipients, then have the right to bring an openness application within 30 days of receiving the notice. The ability to bring an

openness application and seek continued contact with a child after adoption makes the distinction between holders and recipients extremely important from a rights perspective.

In determining whether to make a child an access holder or recipient, Justice Sherr found that making a child an access holder when a child has expressed a desire to maintain a relationship with the other person is a “recognition of the importance of that child’s feelings and views.” He stated that it also takes into account Article 12 of the *UNCRC*, which includes the ability of children to be given the opportunity to express their views to decision-making bodies. Justice Sherr further noted that the right to bring an openness application “allows children, who have to live with the decisions made by others, the ability to share their concerns about the impact of those decisions on their lives.”¹²⁷

While children are regularly made access holders, courts have sometimes been more restrictive in making parents or other family members access holders. Generally, courts have been reluctant to make a parent or other person an access holder when there is evidence that they have undermined the child’s placements or when they are found to be unreasonably litigious.¹²⁸

6. OPENNESS AS A LEGAL CONSTRUCT IN ONTARIO

Openness and access after extended care are closely connected under the *CYFSA*, however, they have developed along different trajectories. As described above, the access test after extended care remained a very onerous test until 2018 when it shifted to a best interest analysis. Until 2018, the test did not allow a Court to consider a child’s views and wishes if there was a finding that the access order would impair future opportunities for adoption.¹²⁹ In contrast, the openness provisions as early as 2011 permitted children who were access holders, to bring an openness application to individuals that were important to them. The two approaches seemed incongruent, but the introduction of the new access test under the *CYFSA* provided a more cohesive approach to maintaining connections for children throughout the legislation.

Openness, like access, has also evolved significantly since 2006 when it was first referenced in child protection legislation. Now, over fifteen years later many Societies consider it best practice to recognize the importance of continuing relationships for children post adoption.

¹²⁷ *Children’s Aid Society of Toronto v. U. (E.)*, 2014 ONCJ 299, 2014 CarswellOnt 8346 (Ont. C.J.) at paras. 260-262.

¹²⁸ *Children’s Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at paras 193, 197 and 254(m); *Children’s Aid Society of Toronto v. U. (E.)*, 2014 ONCJ 299, 2014 CarswellOnt 8346 (Ont. C.J.) at paras. 257-259; *Catholic Children’s Aid Society of Toronto v. K.G.*, 2021 ONCJ 621, 2021 CarswellOnt 18368 (Ont. C.J.) at paras. 198-204.

¹²⁹ *Children’s Aid Society of Toronto v. W. (C.J.)*, 2017 ONCJ 212, 2017 CarswellOnt 4790 (Ont. C.J.) at para. 168, additional reasons *Children’s Aid Society of Toronto v. C.J.W.*, 2017 CarswellOnt 8130 (Ont. C.J.).

When the *CFSA*¹³⁰ first introduced openness agreements and openness orders in 2006, the legislation required all access orders to a child be terminated before a child could be placed for adoption.¹³¹ Under the 2006 amendments, openness orders could only be obtained with the consent of all parties, including the adoptive parents, and any children who were 12 years of age or older.¹³²

In 2011 the *CFSA* was amended to allow children with existing access orders to be placed for adoption with a provision that terminated the access order upon placement for adoption.¹³³ The *CFSA* provided that prior to an adoption placement any person named on the access order had to be served with a Notice of an Intention to Place a Child for Adoption (“Notice of an Intention to Place”). Individuals with a right of access (referred to as access holders) were advised that they could bring an openness application within 30 days of receiving the notice. Individuals who did not have a right of access (referred to as access recipients) were advised that the access order would end upon the child’s placement for adoption, but they did not have the right to seek openness.¹³⁴ Openness orders introduced in 2011 did not require the consent of the parties, although the consent of the child placed for adoption was required if they were 12 or older. While adoptive parents were not parties to an openness application under the 2011 amendments, the Court was required to consider the adoptive parent’s ability to comply with the proposed order.¹³⁵

Another significant change in 2011 was an obligation on Societies to consider openness for all children in adoption planning. Societies were required to look at what relationships are important to children and to consider the benefits of continuing those relationships post adoption.¹³⁶ In 2018, the *CYFSA* carried forward the openness provisions under the *CFSA* and further expanded openness. The new openness provisions were part of a significant redesign of

¹³⁰ The *CFSA* was repealed in 2018 and replaced by the *CYFSA*.

¹³¹ The former s. 141.1(a) of the *CFSA* was repealed in 2011 but had prohibited the society from placing a child for adoption until any outstanding access order to the child under Part III of the *CFSA* was terminated.

¹³² *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*repealed*), s. 145.1 and s. 153.6 [*CFSA*]. (The corresponding provisions under the *CYFSA* are found at s. 194 and s. 212).

¹³³ *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*repealed*), s. 143(1) The corresponding provision under the *CYFSA* is found at 191(1).

¹³⁴ The process of serving notices of an intention to place and bringing openness applications was originally governed by s. 145.1.1 and s. 145.1.2 of the *CFSA*, those provisions have now been repealed with the introduction of the *CYFSA* but similar provisions (with some changes) have been enacted under s. 195 and s. 196 of the *CYFSA*.

¹³⁵ *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*repealed*), s. 145.1.2(7). The corresponding provision under the *CYFSA* is found at 196(8). For a more in-depth analysis of the 2006 and 2011 openness amendments, please see McCarty, Elizabeth McCarty and Pilch, Mira, “Openness Orders: A New Frontier in Ontario Adoption Law”, CFLQ Dec (2014) 34.1, pp.81-134.

¹³⁶ Originally introduced in s. 141.1(b) of the *CFSA*. Section 185(2) is the equivalent section of the *CYFSA*.

child welfare legislation in Ontario. Relevant to openness was the inclusion of a new best interests test discussed above, expanded notice and participatory rights for children, a new openness process for FNIM children and provisions to ensure children maintain connections in the event of an adoption disruption or breakdown.

(a) How is Openness Defined?

Openness allows a continuation of a relationship after adoption and is defined under the *CYFSA* as:

openness includes written, verbal or face to face contact or communication, where the communication may be direct or indirect and may permit the disclosure of identifying or non-identifying information and the frequency of contact or communication may vary from episodic to ongoing.¹³⁷

Section 179(1) of the *CYFSA* also includes a separate definition of an “openness order”:

Openness order means an order made by a court in accordance with this Act for the purposes of facilitating communication or maintaining a relationship between the child and,

- (a) a birth parent, birth sibling or birth relative of the child,
- (b) a person with whom the child has a significant relationship or emotional tie, including a foster parent of the child or a member of the child’s extended family or community, or
- (c) in the case of a First Nations, Inuk or Métis child,
 - (i) a person described in clause (a) or (b), or
 - (ii) a member of the child’s bands and First Nations, Inuit or Métis communities who may not have had a significant relationship or emotional tie with the child in the past but will help the child to develop or maintain a connection with the child’s First Nations, Inuit or Métis cultures, heritages and traditions and to preserve the child’s cultural identity and connection to community; (“ordonnance de communication”)¹³⁸

The definition of openness is broad and flexible, which allows for child focused decision-making based on the individual needs and best interests of the child who is the subject of adoption planning. The definition of an openness order is slightly more directive in that it speaks to facilitating communication or maintaining a relationship with a birth parent or someone with whom the child shares a significant emotional tie. In the case of FNIM children, the definition also allows for the inclusion of a person with whom the child does not currently

¹³⁷ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Ontario Reg 155/18, s. 94(1).

¹³⁸ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 179(1).

have a significant relationship or emotional tie to allow the child to develop or maintain a connection with the child's FNIM cultures, heritages, and traditions.

(b) How is Openness Different from Access?

Openness and access are different legal concepts with different purposes. As a starting point, not all extended care orders with access lead to an adoption as adoption is not the only permanency option available. Other permanency options include custody orders and customary care for Indigenous children.¹³⁹ The primary purpose of an access order is to allow children to maintain relationships after extended care. Even when adoption is the preferred permanency plan there can be delays in matching a child with an adoptive home that is able to meet the child's needs and is acceptable from the child's perspective, it is not unusual for a year to pass between an extended care order and an adoption placement. In *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, the Court implemented an expansive access regime post extended care with a transition order for three First Nations children in part based on the Society's evidence that adoption placement can take a significant amount of time.¹⁴⁰ The Court found that, "The children should not be deprived of the love and meaningful connection their parents and paternal grandmother have for them while that process [the matching process] takes place."¹⁴¹

There is a trend in some recent cases to include an access order that can easily transition into an openness order, particularly for younger children.¹⁴² That approach may be helpful when you have an identified adoptive family or the move to adoption will happen quickly, as it considers the child's current needs and manages the expectations of the parties about the long-term openness plans. Parties should be aware however, there is no presumption that the access ordered in an extended care proceeding will be ordered on an openness application.¹⁴³

The distinctions between access and openness have also been articulated clearly in case law. In the first reported openness decision, *M. (S.), Re ["Re SM"]*,¹⁴⁴ Justice Katarynych thoughtfully considered the 2006 openness

¹³⁹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 112.

¹⁴⁰ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at paras. 259, 207(a) and 254.

¹⁴¹ *Children's Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 254.

¹⁴² See *Simcoe Muskoka Child, Youth and Family Services v. S.M. et al.*, 2021 ONSC 5433, 2021 CarswellOnt 11403 (Ont. S.C.J.); *Children's Aid Society of Toronto v. M.M.*, 2021 ONCJ 676, 2021 CarswellOnt 20072 (Ont. C.J.); *Children's Aid Society of Toronto v. S.C.M.K.*, 2021 ONCJ 347, 2021 CarswellOnt 9050 (Ont. C.J.); *Jewish Family and Child Service of Greater Toronto v. N.D.*, 2021 ONCJ 369, 2021 CarswellOnt 9960 (Ont. C.J.).

¹⁴³ *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto*, 2016 ONCJ 242, 2016 CarswellOnt 6752 (Ont. C.J.) at para. 27; *A.L. v. The Children's Aid Society of Haldimand and Norfolk [unreported]*, 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 34.

amendments and commented that adjudication of an openness application is not the same as adjudication of an access order, pointing out that there is a significant difference between Crown wardship and adoption as “much more is taken away by adoption.”¹⁴⁵ As Justice Katarynych stated, maintaining a “sliver” of connection may be “a very important sliver to the child” with some considerable benefit “even in a sliver, viewed through the long lens of an ever maturing child.”¹⁴⁶

The Court in *Native Child and Family Services v. G. (J.E.)*, relied on the comments in *Re SM* stating that openness should focus on the emotional connection of the child to the biological family, as it is no longer the parent-child relationship that is continued.¹⁴⁷ In *F. v. Simcoe Muskoka Child, Youth & Family Services*, the Court highlighted the difference between openness orders made in the context of an adoption plan and access orders made even after a Crown wardship order:

Adoption is different. It is basically a negative process which effectively cuts out the biological parents as operative parents of the child. The adoptive family is now the “forever family” and any openness order has to be structured to meet the interests of permanency and the success of the adoption. That is quantitatively different from maintaining an ongoing relationship between the parent and child in the face of a Crown wardship order.¹⁴⁸

In the recent decision of *M.H.L. v. H.F.*, Justice Doyle succinctly stated that the purpose of openness is to “facilitate a child’s development in his adoptive home by providing a link for the child to his past and heritage” acknowledging that this is very different than the purpose of an access order.¹⁴⁹

¹⁴⁴ *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) [*Re SM*] There are many legal principles established in this decision that continue to be relevant in openness considerations today. There are, however, some elements of the decision that people should be cautious about relying on for two reasons: 1. From a procedural perspective, this was a decision under the equivalent of s. 194 of the *CYFSA*. At the time of this decision, the only route to openness was an application brought by the Society on the consent of all parties, the adoptive parents were parties under this section and an application could only be brought when there was no access order in effect. In 2011 and 2018 there were further amendments that allowed for other parties to bring applications for openness that did not require the consent of all parties. 2. There have been some significant substantive changes in the law since this decision. For example, the interpretation of beneficial and meaningful has a very different interpretation under Part V than it did at the time this decision was made (see *Children’s Aid Society of Toronto v. J.G.*, 2020 ONCA 415, 2020 CarswellOnt 8820 (Ont. C.A.)).

¹⁴⁵ *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) at paras. 258-262.

¹⁴⁶ *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) at para. 262.

¹⁴⁷ *Native Child and Family Services v. G. (J.E.)*, 2014 ONCJ 109, 2014 CarswellOnt 2682 (Ont. C.J.) at para. 84.

¹⁴⁸ *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 33.

The differences between openness and access have evolved into clearer legal concepts over time. It is essential to understand these differences when advising clients, however, it is also important to recognize that in practice the distinctions are difficult for biological family members, adoptive parents, and children to understand without support and education. These concepts need to be discussed throughout the planning process so that everyone is prepared. Ideally there should be transition planning from access to openness so that the changes will be easier for children and families to understand and manage.

Contact, a legal concept discussed previously in this article, also plays a significant role in openness planning. Under the legislation, an access order is terminated upon a child's placement for adoption and an adoption placement will normally occur before a final openness order. While the *CYFSA* does allow for temporary openness orders to be made during the period of time after the access order has terminated and before the final openness order is made, it is more common for the parties to agree to a transition process under the contact provisions.¹⁵⁰ Until the adoption order is finalized the child remains in the extended care of the Society and the Society can continue to allow contact under section 105(9) of the *CYFSA*. That contact is discretionary so in situations where the contact cannot be agreed upon, a party to the openness proceeding can seek a temporary order under section 196(11) and section 197(10) of the *CYFSA*.¹⁵¹

(c) Openness Under the *CYFSA* and a Summary of Current Openness Provisions

In addition to carrying over the openness provisions under the *CFSA*, the *CYFSA* introduced new openness requirements for FNIM children that have to be interpreted in conjunction with the *Federal Act*.¹⁵² The *CYFSA* also introduced provisions to address adoption disruptions and breakdowns and expanded children's participatory rights in openness proceedings. This section will address the context of the changes under the *CYFSA*, examine the specific amendments, consider the application of the *Federal Act*, provide an overview of openness options available in Ontario, provide practical examples of openness terms that are included in orders, and address how openness arrangements can be varied or terminated.

(d) Context to Changes Under the *CYFSA*

The amendments in 2006, 2011 and 2018 each increasingly focused on keeping children connected with their identity, culture, and family and the amendments in 2018 reflected an increased recognition of children's voices and

¹⁴⁹ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at para. 63.

¹⁵⁰ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s.105(9).

¹⁵¹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s.196(11) and 197(10).

¹⁵² *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24.

rights under the UNCRC. While there is an absence of research on openness in public adoption the research indicates that there are challenges to developing workable openness arrangements. The research also points to openness being associated with a healthy adoptive identity in children.¹⁵³ Two practical realities also necessitated the expansion of openness:

1. Ontario developed policy initiatives that have focused on permanency planning for older children who often have very established relationships prior to an adoption;¹⁵⁴ and
2. the impact of social media— it has changed adoption as we know it.

The Evan B. Donaldson Institute highlighted the internet and social media in their reports *Untangling the Web I and II* examining the internet's transformational impact on adoption and questioned the ethical construct of closed adoptions. The second report included a survey of over 2000 adoptive families, birth parents, adopted persons and adoption professionals to provide data to understand how the internet has impacted adoption.¹⁵⁵

Their 2013 report recommended that:

Adoption professionals — as a matter of routine — must educate expectant, prospective adoptive and birth/first parents that most, if not all, adoptions may one day be open, no matter how they begin. As part of the process, professionals should provide everyone concerned with information and resources about openness in adoption, how to shape and navigate relationships and other related subjects.

The likely end of the era of closed adoption is one of the most profound changes brought about by the Internet. Social media sites, personal blogs and many other online mechanisms exist that expedite searches, reunions and connections — with significant positive, negative and unexpected consequences. For instance, as we noted in our previous paper: “Untangling the Web I,” minors already can — and sometimes do — locate and connect with biological relatives, and they are sometimes contacted by birth family members without their parents’ knowledge. Adoptive parents need to be informed about this possibility and be equipped to talk with their children about this subject and to manage their need and desire to know.”¹⁵⁶

Justice Pugsley, in *Bruce Grey Child and Family Services v. G. (R.)*, recognized that social media is a reality that should be considered in openness decisions.

¹⁵³ *The Child Welfare Toolkit: Openness in Adoption*, February 22 2022.

¹⁵⁴ Ontario has targeted adoption subsidies available to families, who meet certain financial criteria, to adopt children who are eight years of age or older as well as for sibling groups. See: [Adoption services and supports | Ontario.ca](https://www.ontario.ca/adoption-services-and-supports)

¹⁵⁵ While the Evan B. Donaldson Institute is no longer in operation both of these reports can be found on the Nation Center on Adoption and Permanency at www.nationalcenteronadoptionandpermanency.net/post/untangling-the-web

¹⁵⁶ www.nationalcenteronadoptionandpermanency.net/post/untangling-the-web

Despite the objections of the adoptive parent, Justice Pugsley ordered sibling openness because the relationship was important to the children. He also commented on the risks of not planning for openness in an age of social media and stated:

. . . young people today tend to communicate by technical means foreign to those of a past generation. These two children are, I think, still at the edge of the age when that will be their prime mode of discourse. Better to start communication the old fashion way now before computers and cell phones arrive, than for the children to open their own lines of communication through social media without the guidance of those who will help them bear with the tribulations of that contact now.¹⁵⁷

Justice Katarynych in *M. (S.), Re*, while not focused on social media, noted that keeping artificial barriers in an adoption plan may not be a well thought out plan. She referenced that a child who can take public transit can quite easily arrange to see a parent if they live in the same city and may hide that contact from the adoptive parents if contact is not planned.¹⁵⁸ Justice Katarynych's comments in 2009 are even more relevant in 2022 when many children have their own phones and easy access to social media.

While not an openness case, Justice Himel referenced the impact of social media and DNA services on the issue of access orders in *CAS v. JB and GM*.¹⁵⁹ Justice Himel ordered access between the two siblings before the Court but refused the parents' request to order access with the two older children who were not before the Court and whom the children had not met. The Court did, however, encourage the Society to try and arrange contact between the siblings, stating that, "In this era of social media and DNA family finding programs, the children will likely find one another eventually. It seems unnecessary and perhaps cruel to prevent contact between the siblings until they find one another as teenagers or in adulthood."¹⁶⁰

Ready access to social media and DNA testing sites has changed the secrecy inherent in many adoptions. The policy decisions to increase openness in adoption in Ontario should be seen within this evolution. While direct contact is not necessarily appropriate in every case, the realities of technology and the internet suggest that, at a minimum, the possibility of contact needs to be considered in all cases and adoptive parents should be educated on the realities of social media.¹⁶¹ An informed determination can then be made on the unique facts of each case as to whether openness is in the child's best interests.

¹⁵⁷ *Bruce Grey Child and Family Services v. G. (R.)*, 2016 ONCJ 557, 2016 CarswellOnt 14288 (Ont. C.J.) at para. 44.

¹⁵⁸ *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) at para. 136.

¹⁵⁹ *CAS v. JB and GM*, 2020 ONSC 7457, 2020 CarswellOnt 17739 (Ont. S.C.J.).

¹⁶⁰ *CAS v. JB and GM*, 2020 ONSC 7457, 2020 CarswellOnt 17739 (Ont. S.C.J.) at para. 87.

¹⁶¹ The Adoption Council of Ontario has developed a number of educational seminars and

(e) Openness Process for First Nation, Inuit or Métis (FNIM) Children

The most significant change to openness under the *CYFSA* was the inclusion of new openness provisions for FNIM children. While provisions in the *CYFSA* seek to ensure that FNIM children do not lose their connections to their family and community, adoption under the *CYFSA* is not the preferred permanency plan for Indigenous children. As summarized in a 2015 Discussion Paper on the impact of Indigenous adoptions in Canada, adoption of Indigenous children has to been seen within the “systemic dismantling of Indigenous child-rearing, family, community and kinship structures”.¹⁶²

Child welfare interventions and secretive external adoptions on a massive scale in what are known as the Sixties and Millennium Scoops are merely more recent iterations of colonial strategies of removal, abuse, and theft, not only of Indigenous children, but their culture and land.¹⁶³

In cases, however, where adoption is determined to be a culturally appropriate permanency option for FNIM children, section 187(2) of the *CYFSA* requires a Society, at the start of planning an adoption of an FNIM child, to consider the benefit of an openness order as a mechanism to develop or maintain a child’s connection to their band or FNIM community.¹⁶⁴ In addition, the *CYFSA* created a new process to obtain openness orders when an FNIM child in extended care is moving on to adoption. Section 197 provides that before placement for adoption, a Notice of Intention to Place an FNIM Child is served advising the child and the First Nation or FNIM Community that they have 30 days to apply for an openness order between the child and a representative of the First Nation or FNIM Community.¹⁶⁵ It is important to note that the purpose of this section is different than openness orders under section 194 and section 195 in that it allows not only for the maintenance of a child’s connections but also the development of a connection.¹⁶⁶

resources to address this reality and in the views of these authors this type of education should be mandatory for adoptive parents in understanding openness planning for children — those resources can be found on their website: Webinars - Adoption Council of Ontario.

¹⁶² di Tomasso, L., & de Finney, S. (2015). A Discussion Paper on Indigenous Custom Adoption Part 1: Severed Connections - Historical Overview of Indigenous Adoption in Canada. *First Peoples Child & Family Review*, 10(1), 7-18 at p. 7. Retrieved from <https://fpcfr.com/index.php/FPCFR/article/view/247>.

¹⁶³ di Tomasso, L., & de Finney, S. (2015). A Discussion Paper on Indigenous Custom Adoption Part 1: Severed Connections - Historical Overview of Indigenous Adoption in Canada. *First Peoples Child & Family Review*, 10(1), 7-18 at p 7. Retrieved from <https://fpcfr.com/index.php/FPCFR/article/view/247>.

¹⁶⁴ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 187(2).

¹⁶⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 197(2), (3) and (4).

¹⁶⁶ Section 197 is similar to s.195 and s.196 in that the Society is required to serve notice on

While each First Nation and FNIM Community is unique in terms of the provisions they request in openness orders under section 197, the OCL has requested terms to:

- a) provide for ongoing communication with the child's First Nation/ FNIM community;
- b) ensure the child's attendance at family and group events;
- c) provide the child with traditional language classes and other educational tools; and
- d) allow for traditional decision-making processes to assist in developing a cultural plan for the child.

(f) An Act respecting First Nations, Inuit and Métis children, youth and families

Amendments to the *CYFSA* and the *Federal Act*,¹⁶⁷ both prioritize placing Indigenous children with members of their family and/or community. The *Federal Act* has a number of provisions that are relevant to adoption and permanency planning for FNIM children including:

- (a) the requirement to consider Indigenous customs and traditions including custom adoption;^{168 169}

the child and a representative of a First Nation and/or FNIM Community if there is one identified. Anyone who received a notice and the society, then has 30 days to apply for an openness order after notices are received. See *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 197(3).

¹⁶⁷ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24.

¹⁶⁸ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, s. 16(2.1).

¹⁶⁹ di Tomasso, L., & de Finney, S. (2015). A Discussion Paper on Indigenous Custom Adoption Part 2: Honouring Our Caretaking Traditions. *First Peoples Child & Family Review*, 10(1), 19-38. Retrieved from <https://fpcfr.com/index.php/FPCFR/article/view/248>. di Tomasso and de Finney provide detailed description of custom adoption in this paper while starting from the point that adoption is a "Euro-Western concept" as Indigenous traditions do not terminate relationships between children and their "families, cultures and communities" they are designed to strengthen relationships (p. 20-21). The authors acknowledge that there is no one form of custom adoption across Indigenous communities as each community has their own unique and diverse traditions and practices (p. 21). Instead of defining custom adoption, they highlight four main differences between custom adoptions and "non-Indigenous statutory adoptions" including:

- 1. They rarely involve strangers and often involve relatives or kin.
- 2. They are not about parenthood, but about kin relationships that concern the entire community.
- 3. In addition to the needs of the child, they consider the needs of adults and relatives, such as siblings.

- (b) when providing child welfare services to an Indigenous child, the Society must continue to reassess the priority of placements, even after an extended care order has been made. This includes a consideration of placing children with or near other children who are members of the child's family;¹⁷⁰ and
- (c) when a child is not placed with their family, the child's attachments, and emotional ties to each member of their family are to be promoted to the extent that it is in the child's best interests.¹⁷¹ While this section does not reference openness, it is relevant for openness applications under the *CYFSA* for FNIM children as they promote the continuation of contact with family.

The *Federal Act* affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services. It also allows an Indigenous governing body to give notice of their intention to exercise their own legislative authority in relation to child welfare services.¹⁷² As Indigenous governing bodies across Canada exercise their jurisdiction it is important to understand how those laws impact adoption as the *Federal Act* provides they will have the force and effect of federal legislation.¹⁷³ Although, the Quebec Court of Appeal ruled that Indigenous laws are not necessarily paramount over provincial legislation, the Federal government has indicated their intention to appeal this point.¹⁷⁴ In any event, it is necessary to understand whether Indigenous children and families have other laws that must be considered beyond the *CYFSA* and the *Federal Act*. For example, in Ontario the Wabaseemoong Independent Nations have entered into a coordination agreement and their Customary Care Code is now in force.¹⁷⁵ While the Anishinabek Nation's draft Child Well-Being Law is not yet in force under the *Federal Act*, it includes a provision that adoption must

4. Birth and adoptive families develop and agreement together. The birth family's needs are important and contact between both families and the child is encouraged. (p. 21)

¹⁷⁰ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, Preamble, s.16(3).

¹⁷¹ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, s. 17.

¹⁷² *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, s. 20.

¹⁷³ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, s. 21.

¹⁷⁴ *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185, 2022 CarswellQue 1157 (C.A. Que.) and the announcement that the Federal Government will appeal the decision in relation to s. 21 and 22(3) <https://www.canada.ca/en/indigenous-services-canada/news/2022/03/the-government-of-canada-appeals-the-quebec-court-of-appeals-opinion-on-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families.html>.

¹⁷⁵ See: <https://wabaseemoong.ca/wabashki/>.

be consented to by the child's parents and the child's First Nation, neither of whom are required to consent to an adoption after an extended care order under the *CYFSA*.¹⁷⁶ These examples reinforce the requirement to understand the applicable laws that are in effect for a child who identifies with a First Nation as laws enacted outside of your provincial or territorial jurisdiction may apply. The federal government maintains a list of all Indigenous governing bodies that have given notice under the *Federal Act* to exercise their own jurisdiction.¹⁷⁷

(g) Maintaining Connections if there is a Disruption or Breakdown

Another significant provision enacted under the *CYFSA* in 2018 was the introduction of section 220 which acknowledged that adoption disruptions and breakdowns are, unfortunately, a part of adoption.¹⁷⁸ Section 220 clarifies that openness orders continue to be in force following an adoption disruption or breakdown.¹⁷⁹ In addition, the *CYFSA* requires that Societies make reasonable efforts to assist a child who was placed for adoption or was adopted to maintain relationships with persons who are meaningful and beneficial to the child.¹⁸⁰

Prior to the introduction of this provision, there was uncertainty as to the rights and entitlement of children to openness when adoptions were disrupted. The *CYFSA* provided that access orders terminated upon placement for adoption and some Societies took the position that the openness orders were *in personam* orders (as opposed to *in rem* orders) and therefore terminated when an adoption broke down. That approach left children without an order protecting their contact with family and community members, even after court orders for both access and openness confirmed the importance of the relationship. Section 220 clarifies that openness orders continue in force and effect unless they are varied or terminated, protecting contact for children despite changes in their circumstances. This is a critical amendment from a child's rights perspective and is consistent with Article 8 of the *UNCRC* that provides a child has the right to preserve their identity, including "family relations as recognized by law without unlawful interference."¹⁸¹

¹⁷⁶ Section 44 of the Draft Anishinabek Nation Child Well Being Law at [Anishinabek-Nation-Child-Wellbeing-Law-revised-January-2019.pdf](#).

¹⁷⁷ See at <https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367>.

¹⁷⁸ Many jurisdictions do not keep statistics on adoption disruptions and breakdowns which raises important questions about how to provide evidence-based supports for adoptive families and children to preempt these experiences for children. The North American Council on Adoptable Children has put out policy, practice, and research recommendations to try and prevent this additional trauma for children. The recommendations also highlight the need to collect data to better understand why adoptions disrupt and break down. See: Adoption Disruption and Dissolution - The North American Council on Adoptable Children (nacac.org).

¹⁷⁹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 220(3).

¹⁸⁰ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 220(2).

¹⁸¹ *UNCRC*, Article 8.

(h) Additional Requirements for Children’s Notification and Participation in Openness Proceedings

Consistent with the overall approach of the *CYFSA*, several provisions were enacted to increase children’s awareness of, and participation in, adoption processes and to expand participatory rights for children in openness proceedings. Upon implementation of the *CYFSA*, the Child Welfare Secretariat and Ministry of Children and Youth Services (as they then were) prepared a plain language guide to assist in understanding the changes in the legislation. The guide stated that these changes were introduced to ensure that “the children have an opportunity to understand the notice/applications being served upon them, to know what their legal rights are, and to have an opportunity to access legal representation in openness proceedings, where appropriate.”¹⁸²

Prior to the introduction of the *CYFSA*, a Society served all Notices of an Intention to Place a Child for Adoption directly on the child. A protocol was in place to require Societies to serve the OCL but only when the Notices of an Intention to Place advised that the child had a right to seek openness (i.e., they were the access holder). Under the *CYFSA* the requirement to serve the OCL is included in the legislation as part of effecting service on the child and applies to all Notices, even when the child has not been identified as a holder of access with the right to seek openness.¹⁸³ Further, new provisions were added to provide that the OCL is to be served with all applications for openness brought under Part VIII. Under the *CYFSA*, Notices and any openness applications are to be served on the child by leaving a copy with the OCL, the child’s lawyer (if any), and the child, if the child is 12 years or older.¹⁸⁴ Section 211 was also introduced to permit the OCL to provide legal representation to a child in a matter under Part VIII that is not dependent upon receiving Notices of an Intention to Place or a court order.¹⁸⁵ This allows the OCL to participate in early openness planning for children and allows everyone to negotiate the terms of openness before Notices and openness applications are served.

In further recognition of children’s rights, a new provision allows a child who is adopted the right to seek leave to vary or terminate an openness order after an adoption order is made and to appeal an order to vary or terminate an openness order after adoption.¹⁸⁶ These provisions not only grant expanded legal rights for

¹⁸² *The Guide to the Implementation of the Selected Provisions of the CYFSA, 2017*, p 36. This Guide can be found on the OACAS website at [ld.php \(libguides.com\)](http://ld.php.libguides.com) and was distributed widely upon implementation of the *CYFSA*. It was referenced in *Office of the Children’s Lawyer v. Catholic Children’s Aid Society of Toronto*, 2020 ONSC 4310, 2020 CarswellOnt 9851 (Ont. S.C.J.) to address the legislative intent of provisions.

¹⁸³ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 195(4).

¹⁸⁴ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 194(3), s. 195(3), s. 196(3), s. 197(4)(7), 198(4), s. 207(5).

¹⁸⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 211.

children, but also ensure that children have access to legal counsel to exercise those rights.

(i) Range of Openness Options in Ontario

The legislative changes in openness discussed above provide children in Ontario with a wide range of options to maintain connections to important people in their lives and to maintain connections to their culture and community. It is the most expansive range of openness options for children across Canada.¹⁸⁷

¹⁸⁶ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 207, s. 208.

¹⁸⁷ In writing this article, the authors contacted provincial and territorial governments across Canada to discuss their approach to access and openness and to better understand their legislation. This paper does not address these different approaches in detail but the ability to maintain connections and how those connections are maintained post adoption varies greatly across Canada. For example:

- There are provinces that do not make a distinction between the legal concepts of access and openness and permit access orders to be made as part of the adoption process (for example see s. 36(2) of the *Adoption Act* of both Nunavut (S.N.W.T. 1998, c.9) and the Northwest Territories (SNWT 1998, c 9).
- There are also provinces such as Nova Scotia whose legislation previously allowed the Court to make an openness order (similar to the legislation in Ontario) but repealed that legislation in 2017 removing the ability of a Court to make openness orders and, in fact the legislation no longer permits the Court to make an access order after a permanent care and custody order. The current legislation does still provide for openness agreements (see s. 78B of the *Child and Family Services Act*, SNS 1990, c. 5). Interestingly Newfoundland and Labrador's legislation did not allow the court to make an access order after a continuous care a custody order but was found to be unconstitutional as it did not allow the court to make an order that was in the best interests of children (see *T. (J.) v. Newfoundland and Labrador (Manager of Child, Youth and Family Services, Zone E)*, 2015 NLCA 55, 2015 CarswellNfld 457 (N.L. C.A.)). While there is no ability to make an openness order under the Newfoundland legislation, Newfoundland's *Adoption Act* allows for the development of openness agreements both pre and post adoption, see s. 51 and 52 (SNL2013, c A-3.1).
- There are other provinces, such as Alberta that report significant changes to their approach for children that have reduced the need for adoption as a permanent plan. The Child Intervention Practice Framework in Alberta focuses on expanding the child's community of care increasing the individuals who can support the children, even if they are not able to present a plan. For example, an aunt may not be able to plan for the child but may be able to have the child for dinner once a month. Their approach is to build these supports around the child and their reported experience is that it has reduced the need to use adoption as a model for permanency plan. Alberta reported when these children do move on to adoption, their expectation is that these circles of support remain and are continued post adoption. Provincial and territorial child protection legislation and policy - 2018 - Canada.ca sets out some of these non-legislative changes in Alberta at p. 8. Interestingly the legislation in Alberta does not specifically reference openness but there is a requirement to advise the court on an adoption application of any agreement or order respecting access to the child — see *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12, s 63.
- Prince Edward Island does not have a reference to openness orders, but they do have a provision that allows for an agreement between birth parents and prospective adoptive parents for continuing contact post adoption. Interestingly s. 8(1) of their *Adoption Act* provides that the arrangement will only have legal force if it is recorded as a formal written agreement, the parties have had legal advice and a copy of the agreement is provided to the Director and including with the document provided to the Court when the adoption order is made. Any

The openness provisions are an example of how the *UNCRC* can be actualized for children. These provisions allow children to identify important relationships and develop plans that reflect their views and wishes rather than relying solely on the discretion of the adults or decisions made by the Society or adoptive parents.

amendments to the agreement or termination of the agreement shall only have legal force if deposited with the Director and the Court. See s. 8(1) and (2) of the *Adoption Act*, SPEI 1992, c.1.

- Other provinces have references to openness agreements, for example, S. 59 of British Columbia's *Adoption Act*, RSBC 1996, c. 5, S.138 of Yukon's *Child and Family Services Act*, SY 2008, c. 1.), New Brunswick also provides for openness agreements under s. 90.01 of the *Family Services Act*, SNB 1980, c. F-2.2, s. 85, and section 33 of Manitoba's *Adoption Act*, SM 1997, c. 47 references openness agreements.

- Section 579 of the *Civil Code of Quebec*, CCQ- 1991 provides for agreements to facilitate the exchange of information or interpersonal relationships post adoption.

- Section 15(2) of Saskatchewan's *Adoption Act*, 198, ss 1998, c.A5-2 provides that access agreements to facilitate communication or maintain relationships can be entered into but specifies that the adoption order shall not include an access provision.

Another, interesting element that came from the discussions with the provincial and territorial governments is that in every other province and territory child welfare is directly delivered by the provincial government with some having delegated agreements for services to Indigenous children and their families. That is significantly different from Ontario's child welfare structure in which there are 51 individual children's aid societies that directly deliver child protection services. This creates significant differences in approaches across the province. That can be a positive in terms of responding to regional needs, but it can also create significant differences in services. Since 2018 the OCL has been involved in all openness cases in the province and there are considerable differences in how agencies approach and support openness. Some Societies see face-to-face contact post adoption as the default approach to ensure children maintain a connection to their birth families, others use indirect methods of contact far more frequently than direct contact. The level of support for openness also varies considerably and may range from intensive education for adoptive parents on openness and direct support for birth parents to limited supports in the way of educational programs for adoptive parents and birth parents.

Summary of Options Available for Openness Under the *CYFSA*

Openness Agreements	Openness Orders after an Extended Care, No Access Order	Openness Orders after an Extended Care, With Access Order	Openness Orders for First Nation, Inuit and Métis Children
s. 212 of the <i>CYFSA</i>	s. 194 of the <i>CYFSA</i>	s. 196 of the <i>CYFSA</i>	s. 197 of the <i>CYFSA</i>
Can be entered into at any time before or after an adoption.	Application can be brought once a plan is identified for adoption and before the adoption order is made.	Application can be brought by an access holder within 30 days of receiving a Notice of Intention to Place for Adoption	Application can be brought by the child, Society, or a band or FNIM community within 30 days of receiving a Notice of Intention to Place.
	Legal Test: * the openness order is in the best interests of the child; * the openness order will permit the continuation of a relationship with a person that is beneficial and meaningful to the child; and * the order is on the consent of the Society, the person who will be able to communicate with the child, the prospective adoptive parents and the child if the child is 12 years or older.	Legal Test: * the openness order is in the best interests of the child; * the openness order will permit the continuation of a relationship with a person that is beneficial and meaningful to the child; and * if the child is 12 years or older, the child is consenting. * The court shall consider the ability of the adoptive parents to comply with the order.	Legal Test: * the openness order is in the best interests of the child; * the openness order will help to develop or maintain a connection with the child's FNIM culture and will preserve the child's cultural identity and connection to community; and * if the child is 12 years or older, the child is consenting. * The court shall consider the ability of the adoptive parents to comply with the order.

This framework is not as complex as it may seem:

- If there is no access order in effect when a child is moving on to adoption planning, the Society can bring an application under section 194 to seek an openness order or facilitate an openness agreement under section 212 of the *CYFSA*. Openness agreements can also be used to facilitate openness after a child's adoption has been finalized.

- If there is an access order in effect, the Notices of an Intention to Place are served and any access holder has the right to bring an openness application. These applications can be resolved with an openness order or an openness agreement or they may be withdrawn or dismissed if openness is not in the best interests of the child.
- If the child is FNIM, Notices of an Intention to Place are served that allow the Society, the child and the child's First Nation and/or FNIM Community to bring an application to develop or maintain a relationship between the child and a representative of their community.

The key to these arrangements is early planning, education, and support. The vast majority of openness applications are resolved on consent and many in an alternative dispute resolution (ADR) or Indigenous forms of alternative dispute resolution (IADR), as evidenced by the lack of litigated openness decisions.

The authors suggest that a fifth option should be added to this menu of openness arrangements – the ability to file an openness agreement with a court so that the provisions take on the force and effect of an order. Prince Edward Island's legislation provides for this option.¹⁸⁸ This would further encourage the early use of ADR and may reduce the number of openness applications brought before the court. At the same time, it would offer children the rights and entitlements of an openness order while ensuring that the order is varied/terminated under the *CYFSA* as discussed below.

(j) What is Included in an Openness Order?

To provide context to how these files are resolved, the following are common terms that are often included in orders:

- face-to-face contact, although there are some that only provide for openness through cards and letters;
- where face-to-face contact is contemplated, the order will often include a provision that the adoptive parents will be present for the openness arrangements;
- face-to-face contact is normally set out as a minimum as opposed to a high frequency schedule (e.g., a minimum of three face to face visits a year);
- typically sibling openness is more frequent than openness with a parent, although that can vary depending on the relationships and the circumstances of the case;
- if the protection concerns involve mental health or addictions, there are often clauses to address a check-in between the adoptive parents and birth family prior to a visit and options to reschedule the visit if the birth family member is experiencing challenges;
- a dispute resolution mechanism to return the matter to ADR in the event of future disagreements is often included;

¹⁸⁸ *Adoption Act*, SPEI 1992, c.1, s. 8.

- a clause that states the openness is not intended to restrict the mobility of the adoptive parents and is accompanied by a clause that provides for a new openness plan depending on how many kilometers away the parties move. This often includes a reduction in the number of visits and or conversion of face-to-face visits to virtual visits;
- there are often terms to address social media interactions including clauses that require the birth parent or family member to notify the parent if the child is using social media to connect with the birth family outside of the parameters of the order; and
- clauses to address changes in a child's views and wishes as they get older and want changes to the terms of openness are often included.

While it would be helpful to have some further research on openness orders and what makes a successful openness arrangement, the nature of openness often requires flexibility as families change and grow. Ideally, families should not have to come back to court or an ADR process to address expected issues and the orders should be flexible enough to navigate through many changes.

(k) Variation and Termination of Openness Orders

The *CYFSA* also sets out the process for variation and termination of openness orders. Openness orders can be varied or terminated but the relevant statutory provisions depend on whether the adoption has been finalized, whether it is an order under section 194, section 196 or section 197, and who is seeking the order. The relevant tests are set out in the chart below.

Order requested	Who can bring before an adoption order is made?	Who can bring after an adoption order is made?	Test
Variation of a s. 194 or s. 196	Under s. 198: A Society A person with whom the child has been placed for adoption	Under s. 207: The adoptive parent The adopted child (with leave) A person who has openness with the child under the order (with leave) Any Society that supervises or participates in the openness order	• Material change • Best Interests of the child • Proposed order will continue a beneficial and meaningful relationship
Termination of a s. 194 or s. 196 order	Under s. 198: A Society A person with whom the child has been placed for	Under s. 207: The adoptive parent The adopted child (with leave) A person who has	• Material change • Best interests of the child • The relationship that is the subject

Order requested	Who can bring before an adoption order is made?	Who can bring after an adoption order is made?	Test
	adoption	openness with the child under the order (with leave) Any Society that supervises or participates in the openness order	of the order is no longer beneficial and meaningful to the child.
Variation of a s. 197 order	Under s. 198: A Society A person with whom the child has been placed for adoption	Under s. 207: The adoptive parent The adopted child (with leave) A person who has openness with the child under the order (with leave) Any Society that supervises or participates in the openness order	• Material Change • Best interests of the child • The proposed order would help the child to develop or maintain a connection with the child's FNIM culture, heritages and traditions and preserve the child's cultural identity and connection to community.
Termination of a s. 197 order	Under s. 198: The Society A person with whom the child has been placed for adoption	Under s. 207: The adoptive parent The adopted child (with leave) A person who has openness with the child under the order (with leave) Any Society that supervises or participates in the openness order	• Material Change • Best interests of the child

(l) Variation and termination of Openness Agreements

The *CYFSA* does not have provisions to enforce or terminate an openness agreement, although section 212(3) does state that an agreement can include a dispute resolution process provision.¹⁸⁹ If there are disputes with an openness

agreement that cannot be resolved, there is a line of cases that allows a person to seek access (now referenced as “contact”) under the *CLRA* post adoption as “any other person” under section 21(1).¹⁹⁰ Justice Nevins addressed this issue in *H. (J.) v. G. (B.)* and found that a biological family member could meet the threshold of “any other person” if there had been an assurance that contact would continue post adoption, there was an existence of a relationship post adoption, and a prima facie case had been established that the access would be in the best interests of the child.¹⁹¹ Justice Thibideau in *A. (J.) v. B. (J.)* confirmed this route still existed in 2011 after the introduction of the openness provisions under the *CFSA*.¹⁹²

More recently the Ontario Court of Appeal addressed the issue in *A.R. v. M.B.*¹⁹³ In this case a biological parent brought an application for access under section 21(1) of the *CLRA*. She argued that she had agreed to the adoption on the basis that there would be post adoption contact, that there was a relationship post adoption and that it would be in the best interests of the child to allow the application to proceed. The Court of Appeal upheld the decision of the lower court finding that the biological mother did not meet the elements of the test or establish the “exceptional circumstance” required to gain standing under section 21(1). This case clarifies that the threshold test for an application by a biological parent under section 21(1) includes a best interests analysis at the jurisdiction stage and requires “exceptional circumstances” to proceed.¹⁹⁴

When advising clients as to the preferred form of openness (i.e., either an agreement or order), counsel should consider the legal routes if the openness arrangements are challenged in the future. An openness order is varied or terminated under the *CYFSA* and therefore issues are resolved under the openness provisions.¹⁹⁵ The absence of similar provisions for variation or termination of openness agreements means that disagreements may lead to a proceeding under the *CLRA* to determine whether the biological family can seek contact (formerly access). This has some significant implications, particularly when the case law under the *CYFSA* has stressed the significant difference between access and openness.¹⁹⁶

¹⁸⁹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 212(3).

¹⁹⁰ *Children's Law Reform Act*, RSO, 1990, c. C.12, s. 21(1).

¹⁹¹ *H. (J.) v. G. (B.)*, 1993 CarswellOnt 1710 (Ont. Prov. Div.) at paras. 36-37.

¹⁹² *A. (J.) v. B. (J.)*, 2011 ONCJ 726, 2011 CarswellOnt 14645 (Ont. C.J.) at paras. 71-72.

¹⁹³ *A.R. v. M.B.*, 2019 ONCA 462, 2019 CarswellOnt 8881 (Ont. C.A.).

¹⁹⁴ *A.R. v. M.B.*, 2019 ONCA 462, 2019 CarswellOnt 8881 (Ont. C.A.) at paras. 13-17.

¹⁹⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s.198 and s. 207.

¹⁹⁶ For a very interesting discussion of the interplay between openness agreements and *CLRA* applications for access see Cheryl Appell's article “Openness Agreements and the Impact of the Thibideau Decision” prepared for the Ontario Bar Association Conference — Fundamentals in Child Welfare Litigation, November 9, 2012. Ms. Appell questions the decision not to include an enforcement clause for openness agreements in the *CFSA* amendments in 2006 and 2011 as an alternative to biological parents seeking access under

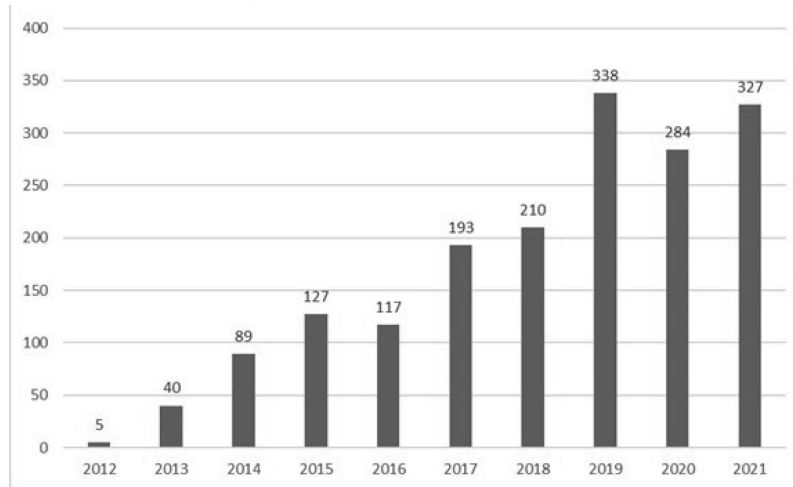
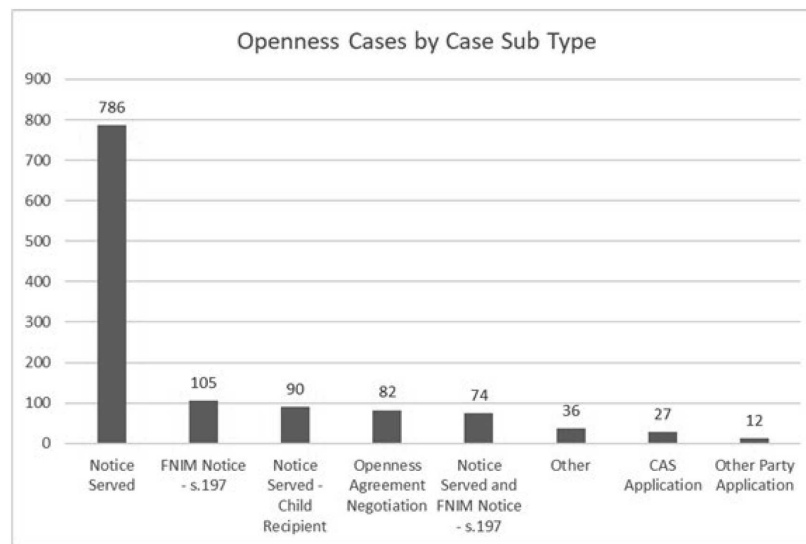
7. DATA ON THE OFFICE OF THE CHILDREN’S LAWYER INVOLVEMENT IN OPENNESS CASES

The OCL began formally representing children in openness proceedings after the introduction of the 2011 openness amendments. From 2011 to 2018 the OCL became involved in openness cases when a child was an access holder and the OCL was served with Notices of an Intention to Place under a Ministry Protocol. In 2018, provisions were included in the legislation that required anyone serving a Notice of an Intention to Place a Child for Adoption (Form 8D.2), a Notice of an Intention to Place a FNIM Child for Adoption (Form 8D.3) or an openness application on a child, to serve the OCL as part of the service on the child. Therefore, as of April 30, 2018, the OCL must be served in all openness matters before the Court. This provides the OCL with a unique perspective about what is happening across the province, including the data referenced below.¹⁹⁷

s. 21(1). She highlights that many States in the US have taken that approach. If you are advising on an openness order v. openness agreement — you should really understand the legal issues discussed in this article.

¹⁹⁷ This data is taken from the OCL database that records the opening details of every openness file that is opened. The data for these charts was collected on January 7, 2022. The first chart pulled every openness file that was created from January 1, 2012, until December 31, 2021, sorted by year. The second chart represents data from the opening details of each openness file opened after January 1, 2018, until December 31, 2021. When an openness file is opened at the OCL, the file is classified as one of the subtypes listed in the chart. There are a few cautions to consider when reading the data in the above charts:

- (a) The number of cases does not reflect the number of children represented or the number of families that are involved in openness as more than one child can be represented in a file.
- (b) The number of files does not reflect the number of applications filed because they may involve multiple children who may each bring their own application and there are cases where children do not bring applications.
- (c) If a file is opened more than once, the data counts the file in the year that it was reopened, not in the year it was originally opened. As of the end of 2021, however, less than 5% of our openness cases have been reopened.

(a) Openness Cases at the OCL by Received Date - since 2012**(b) Number of Openness Cases at the OCL and Case Sub-type since 2018**

The first chart shows the number of openness files the OCL has opened since 2012. The second chart provides information on the sub-type of openness files

since 2018. The focus is on subtypes from 2018 onwards because there are several categories created in 2018 that did not exist before that time.¹⁹⁸

What does this data tell us about openness cases?

- (a) Most files opened by the OCL are cases in which there was an access order in effect and notices are served under section 195 of the *CYFSA*. It is important to note, however, that not all notices served result in court applications seeking openness or openness arrangements. For example, some children do not want to seek openness with family members even though there is an access order, some family members do not want to participate in openness arrangements, or the child's adoption placement may break down before openness arrangements are negotiated.
- (b) The number of files the OCL has opened has increased significantly from 5 files in 2012 to 327 in 2021. The biggest increase occurred from 2018 to 2019 when the case count went from 210 to 338. The increase reflects the change in the access test under the *CYFSA* and the subsequent Court of Appeal decisions which removed some of the barriers to obtaining an access order.¹⁹⁹
- (c) The decrease in files in 2020, was likely due to delays in permanency planning tied to the early stages of the pandemic as very few files were received from March 2020 to June 2020.
- (d) The number of files opened since 2018 highlights that FNIM children continue to be placed for adoption in Ontario. In total there were 179 openness files involving placement of an FNIM child, although some of those files pertain to siblings who had the right to seek openness to an FNIM child.

8. LEGAL ISSUES IN OPENNESS

Openness in Ontario is a relatively new area of practice for counsel. Effectively managing these cases has been complicated by the fact that there are very few reported openness decisions. Since 2016 there have been fewer than 15 reported cases and many cases address procedural issues as opposed to guidance on how the application may be substantively resolved. This is reflective of the fact that most openness proceedings resolve without litigation - it is very rare to have a contested openness proceeding.

One possible explanation for the lack of litigation in openness is the prevalent use of ADR and IADR to resolve openness arrangements. In Ontario ADR/IADR services are readily available under the *CYFSA* and include mediation, family group conferencing, Talking Circles and Indigenous forms of ADR and any other method approved by the Director.²⁰⁰ In the OCL's

¹⁹⁸ For example, the s. 197 notices did not exist and the OCL was not served if the child was an access recipient.

¹⁹⁹ This is difficult to prove conclusively, however, without comparing whether the number of extended care orders have remained constant, increased, or decreased.

experience, mediation and Indigenous forms of ADR are most used in openness files. The Ontario Association of Family Mediators has a specialized openness training process for mediators to assist families in developing relationships and creating arrangements that are workable for the families and children involved.²⁰¹

Consensual resolution of openness files is, in our view, the preferred approach as consensual plans would seem to be the best starting point for the development of ongoing relationships. The lack of judicial decisions, however, does leave a void in terms of guidance about what to expect in an openness file or how to advise clients on what to expect in terms of outcomes in litigated cases.

Openness cases have focused on two distinct issues: (a) substantive decisions that address whether openness is in a child's best interests, and if so, what are the appropriate terms and conditions; and (b) process related decisions.

(a) Substantive Decisions: What are the Legal Considerations in Deciding Whether to Grant Openness?

While the case law is limited, we have identified the three key themes that arise in litigated openness proceedings as follows: (i) the ability of openness to support the stability of the adoption, (ii) the children's views and wishes, and (iii) cultural considerations.

(i) Will the requested openness support the stability of the adoption?

While the adoptive parents are not parties to an openness proceeding under section 196 or section 197 of the *CYFSA*, the court must consider their ability to comply with the proposed openness. From a practical perspective, considerable weight is placed on the views of the adoptive parents and how the openness may impact the adoptive placement.

M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell was one of the first litigated openness trials.²⁰² The decision distinguishes between the concepts of openness and access and highlights that you cannot use an openness proceeding to re-litigate the protection proceedings.²⁰³ The OCL, CAS and

²⁰⁰ See *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 17 and O.Reg 155/18, s. 3.

²⁰¹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 17 provides that a matter can be referred to ADR if a child is or may be in need of protection under the *Act*. Section 17(3) speaks to the notification to the OCL when an ADR is being proposed in regard to a child receiving child welfare services. In this regard it seems clear that ADR services would be available prior to placement of the children and during the adoption placement period as the child continues to receive child welfare services. Section 198 addresses variations and terminations prior to an adoption order is made while s. 207 addresses variations and terminations after the finalization of an openness order. Both include a reference to the availability of prescribed forms of ADR once the application is before the Court.

²⁰² *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 ONSC 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.).

adoptive parents all agreed that there should be some level of openness between the children and their mother, however, the Court was not prepared to grant the frequency of openness requested by the mother which included biweekly contact and overnight visits during the summer.²⁰⁴ Justice Lalande recognized that the relationship was beneficial and meaningful for the children and that they wanted to maintain contact with their mother.²⁰⁵ The Court granted face-to-face contact four times a year and determined the older siblings could also attend the visits.²⁰⁶ The decision was made to maintain important connections for the child while ensuring the emotional health and integrity of the adoptive family.²⁰⁷

In *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto*, the Court declined to make a temporary openness order between the children and their mother, finding:

The security and stability of the children in the home of the proposed adoptive family is the most important factor for the court. If there is an openness order made now, there is a risk of destabilizing and even of jeopardizing the placement.²⁰⁸

In *F. v. Simcoe Muskoka Child, Youth & Family Services*, the OCL brought an openness application seeking openness between the siblings and the parents.²⁰⁹ Consent openness orders provided for openness between the siblings and with the father, however, there was no agreement on openness between the mother and the child.²¹⁰ The mother sought openness in the same terms as her access order. The OCL and the Society argued that there should not be any face-to-face contact based on the mother's inability to accept the adoption and her inability to manage her behaviour.²¹¹ The Court was clear that the purpose of openness was different than access as maintaining a beneficial and

²⁰³ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at paras. 22 and 78.

²⁰⁴ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at para. 77.

²⁰⁵ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at paras. 75-77.

²⁰⁶ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at para. 79.

²⁰⁷ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at para. 78.

²⁰⁸ *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto*, 2016 ONCJ 242, 2016 CarswellOnt 6752 (Ont. C.J.) at para. 63.

²⁰⁹ *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 6.

²¹⁰ *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 6. In an interesting procedural decision, the Court (on the consent of counsel) allowed the mother to respond to the motion for summary judgment although she had not filed an answer to the openness application, and she was not an access holder.

meaningful relationship should be done in a way that will not undercut the stability of the adoptive family.²¹² In this case Justice McDermot ordered the adoptive parents to establish an email address to communicate. The adoptive parents were required to provide quarterly updates to the biological mother and the mother could send emails to the adoptive parents to be responded to no more than once every two months. The Court did not order face-to-face contact.²¹³

A similar theme was identified by Justice Doyle in *M.H.L. v. H.F.* in which the Court had to adjudicate two openness applications, one brought by the OCL (on behalf of a two-year-old client) and one brought by the father.²¹⁴ The OCL and the Society sought two in-person visits a year and the father requested monthly contact. The other terms and conditions of the openness order were agreed upon, the only issue for the court to determine was the frequency of the contact.²¹⁵

Justice Doyle set out several openness principles including:

- The focus moves from reuniting the birth family to doing whatever is necessary to ensure that the adoptive placement succeeds, the child bonds with the new family and the child can move on to live a healthy full life.
- An openness order should focus on the best interests of the child and supporting the child's healthy attachment, permanency, and stability with the adoptive family.
- Openness orders maintain connections to a child's genetic and biological family, they allow the child to ask questions, obtain information and seek answers about their life history.
- The openness contact includes the adoptive family meeting and spending time with the birth family members to support the child's understanding through various stages of development.
- The visits involve the adoptive parents so that the adopted child can feel secure that they are there for the child.²¹⁶

The final order provided for three in-person visits a year and permitted the paternal grandmother to also attend the visits.²¹⁷

Overall, the stability of the adoptive placement will be at the forefront of judicial decisions in openness applications. It is not appropriate to use openness proceedings to relitigate an extended care proceeding as the focus will be on

²¹¹ *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 15.

²¹² *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 52.

²¹³ *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, 2017 CarswellOnt 14372 (Ont. S.C.J.) at para. 60.

²¹⁴ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at para. 1.

²¹⁵ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at para. 5.

²¹⁶ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at paras. 113-116.

²¹⁷ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at para. 124.

building new family relationships for the child. Counsel representing parents and extended family members can assist their clients by helping them obtain support to manage the expected grief and loss that accompanies losing a child, grandchild, or other family member, so they can focus on building a different relationship.

(ii) *Children's Views and Wishes*

A child's views and wishes are a mandatory consideration under the best interests test and the Preamble of the *CYFSA* states that the legislation is to be interpreted in a manner that is consistent with the *UNCRC*, which includes a child's right to have a say in decisions that are made about their lives.²¹⁸ While many reported decisions on openness involve children under the age of three, there are a few that have referenced older children's views.

In *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell* the court agreed to order face-to-face contact four times a year despite the biological mother's inability to accept the adoption or the Crown wardship order from the original proceedings. The 11-year-old twins wanted contact with their mother and the court found that their relationship with their mother was both beneficial and meaningful to the children.²¹⁹

In the unreported decision of *AL v. The Children's Aid Society of Haldimand and Norfolk*, Justice Kril ordered openness.²²⁰ The 10-year-old child's clear and consistent views about the importance of the relationship with his mother was a significant consideration in the decision. The Society sought a dismissal of the openness applications brought by both the mother and the child and argued that an openness order was not necessary as it should be left to the discretion of the adoptive parents.²²¹ At trial the biological mother sought 12 visits a year and the OCL sought four visits a year.²²² Justice Kril found that the contact between the mother and the child was beneficial and meaningful to the child and noted that the Society acknowledged that they continued visits after the child's placement for adoption because ending them would have been emotionally devastating for the child.²²³ The Court determined that some contact would be in the child's best interests despite the significant intrusiveness of the biological mother and her inability to accept that she was no longer in a parenting role, as it would

²¹⁸ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 179(2) and Preamble.

²¹⁹ *M. (L.) c. Valoris pour Enfants et Adultes de Prescott-Russell*, 2014 CSON 2921, 2014 CarswellOnt 6638 (Ont. S.C.J.) at para. 79.

²²⁰ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 56.

²²¹ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 4.

²²² *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at paras. 2 and 3.

²²³ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 42.

recognize the child's feelings and views.²²⁴ The adoptive parent testified that she understood the importance of the relationship to the child and was prepared to facilitate the relationship.²²⁵ The Court dismissed the mother's openness application but made an order for three visits a year with additional terms pursuant to the child's application.²²⁶

In *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto*, the OCL sought a temporary openness order on behalf of two clients aged 7 and 4. The children wanted contact, however, the Court refused to grant the temporary openness requested. Justice Curtis placed considerable weight on the adoptive parents' opposition to the openness order and the conduct of the biological mother.²²⁷

In *Bruce Grey Child and Family Services v. RG*, the Court made a temporary openness order between siblings (aged 8 and 10) despite the objections of the adoptive parent.²²⁸ The Society had not facilitated access between the children as required by a court order and subsequently placed one of the children for adoption without serving the required notices that would have allowed the children to seek openness between each other.²²⁹ Justice Pugsley found that the children's relationship should not be impacted by the failure to follow the Court's previous access order and the statutory requirements.²³⁰ The evidence showed that, despite not having access for several years, the ten year old was "delighted" to know that he might be able to see his sister again. The eight-year-old sister also remembered her brother and was excited about seeing him again.²³¹

The case law suggests that where children are old enough to express views and wishes, the court will give them serious consideration. That approach is reflective of Justice Katarynych's comments in *Re SM* that setting artificial boundaries may not be helpful for older children.²³² Older children know the names of people in their family, they have contact information and often have access to social media and cell phones. Without some structure it is likely the contact will happen in any event. Placing structure and expectations around the contact provides a way to manage the contact instead of driving it underground. Courts seem to be receptive to the fact that if older children have identified

²²⁴ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at paras. 54 and 55.

²²⁵ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 53.

²²⁶ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 56.

²²⁷ *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto*, 2016 ONCJ 242, 2016 CarswellOnt 6752 (Ont. C.J.) at paras. 4, 17-21 and 65.

²²⁸ *Bruce Grey Child and Family Services v. RG*, [2016] O.J. No. 4680 at paras. 1 and 50.

²²⁹ *Bruce Grey Child and Family Services v. RG*, [2016] O.J. No. 4680 at para. 29.

²³⁰ *Bruce Grey Child and Family Services v. RG*, [2016] O.J. No. 4680 at paras. 7, 9 and 10.

²³¹ *Bruce Grey Child and Family Services v. RG*, [2016] O.J. No. 4680 at paras 20, 22 and 36.

²³² *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) at para. 136.

ongoing contact as important to them, that can be considered as a “need” for children similar to other medical or therapeutic needs.²³³ That does not necessarily mean that courts are allowing children to decide the amount of contact. Where the courts recognize the children’s need for openness, they will still place considerable weight on the frequency of contact that adoptive parents identify as workable for their family.

It is noteworthy that the *CYFSA* includes a statutory prohibition in section 196(7)(c) against making an openness order unless the child being placed for adoption consents to the order where they are 12 or older.²³⁴ For these children, their views are not just a mandatory consideration under section 179(2) but they can be determinative if they do not consent to the order sought.

(iii) *Openness as a mechanism to support a child’s connection to their culture, heritage, and traditions*

The best interests test under section 179(2) of the *CYFSA* includes a consideration of a child’s culture, heritage, and other identity characteristics. For FNIM children, the best interest test mandates the court to consider the importance of preserving a child’s cultural identity and connection to community.²³⁵ Openness with family members, community members or the child’s band or FNIM community can be an important mechanism to ensure that connection is developed and maintained both under the provisions of the *CYFSA* and under section 17 of the federal legislation.²³⁶

Returning to Justice Katarynych’s formative decision in *Re SM*, the Court was attuned to the fact that the child was not being placed in an adoptive home that shared his cultural background. The child was of African descent and the biological parents provided a connection to his African culture and Islamic heritage. While Justice Katarynych did not directly tie this factor to the best interests test, it was referenced in her reasons to support openness.²³⁷ Justice Mitrow also acknowledged that openness was a mechanism to maintain cultural connections in *J.N.-L. v. C.S.-N.*²³⁸

²³³ *Children’s Aid Society of the Niagara Region v. S.S. and T.F.*, 2022 ONSC 744, 2022 CarswellOnt 1605 (Ont. S.C.J.) at para. 254.

²³⁴ This requirement was also referenced by Justice Mitrow in his decision in *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 54 and in Justice Trimble in *Halton Children’s Aid Society v. EM*, 2014 ONSC 3921 which was upheld by the Ontario Court of Appeal in *Children’s Aid Society of the Region of Halton v. M. (E.)*, 2014 ONCA 688, 2014 CarswellOnt 13764 (Ont. C.A.) at para. 5.

²³⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 179(2).

²³⁶ *An Act respecting First Nations, Inuit and Métis children, youth and families* S.C. 2019, c. 24, s. 17.

²³⁷ *M. (S.), Re*, 2009 ONCJ 317, 2009 CarswellOnt 3994 (Ont. C.J.) at para. 122.

²³⁸ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 16.

In *M.H.L. v. H.F.* the Court referred to the child's Haitian culture as a consideration, although the Court noted that in this case the adoptive parent shared the birth parent's culture and French language.²³⁹

Cultural considerations were also relied on to support an openness order in *AL v. The Children's Aid Society of Haldimand and Norfolk*. The Court ordered the visits be scheduled around Chinese New Year and the child's Asian birthday and Christmas, recognizing that these cultural events had been traditionally celebrated by the child with his mother and grandparents.²⁴⁰ Justice Kril noted that when the "adoptive family is of a different cultural background", openness can allow children to "maintain important connections to their cultural and heritage".²⁴¹

These decisions reflect the increasing importance placed on identity characteristics under the *CYFSA*. Under the *CYFSA*, service providers are now required to ask families and children how they want their identity characteristics considered in the provision of services.²⁴² Children are increasingly viewed by the Society and by courts as individuals who have an identity that is not erased by adoption and that needs to be recognized and preserved. Openness is another means to ensure a child's identity characteristics are honoured and respected.

(b) Process Related Decisions

In addition to the substantive decisions above, there are several openness cases that speak to process related issues. Openness applications are governed by relatively technical legislative provisions that require an understanding of how they have been interpreted to successfully manage an openness file. There are some unique elements to the openness provisions. For example: (a) you need an understanding of all of the access orders have been made in relation to the child being placed for adoption, not just the access orders made in their own proceeding, (b) it is one of the only areas of family and child welfare law where many of the time limits cannot be extended, and (c) there is often evidence required from non-parties on an openness application.

The complexity of managing openness files is that the technical nature of the legislation is juxtaposed with the purpose of openness. Openness is about building relationships between adoptive parents, birth families and communities to allow for continued contact after an adoption. Ideally these cases are decided in a consensual process where relationships can be developed and where children can have a say in relationships that are important to them. The challenge is to

²³⁹ *M.H.L. v. H.F.*, 2021 ONSC 442, 2021 CarswellOnt 1459 (Ont. S.C.J.) at paras. 28, 37 and 91-98.

²⁴⁰ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at paras. 7, 28 and 39.

²⁴¹ *A.L. v. The Children's Aid Society of Haldimand and Norfolk* [unreported], 2020 ONSC 2232 (Court File Number FC-15-FO-57) at para. 28.

²⁴² *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, Ont. Reg 156/18 s. 4(5).

understand the technical requirements of the legislation while also supporting a mediative approach that will address fears and worries of the people involved in the arrangements.

This section examines several procedural issues that may be encountered during the progression of an openness file, all of which can have a significant impact on the rights of children, biological families and adoptive parents.

(i) Timing of Access Orders and their impact on openness proceedings

One of the first procedural steps in an openness process is serving Notices of an Intention to Place. These Notices are served when the Society has decided to move forward with an adoption plan and there is an access order in effect, or when the child is a First Nation, Inuk, or Métis child. This step is critical to ensure that individuals are aware of their rights, or the rights of others, to seek openness. These Notices and affidavits of services must be included in the adoption application and delays can result when they are not properly completed.²⁴³

Access holders receive a Form 8D.2 that advises them that their access will terminate upon placement for adoption and that they have the right to seek openness. Access recipients receive the same Form 8D.2 but a different section of the form is completed advising that they do not have the right to bring an application for openness. Before a Society completes these forms, they must go through a process of determining:

- (a) Is the child FNIM (because if yes, they are also served with a Form 8D.3)?
- (b) What access orders are in effect? and
- (c) Who is the holder and recipient on the access order?

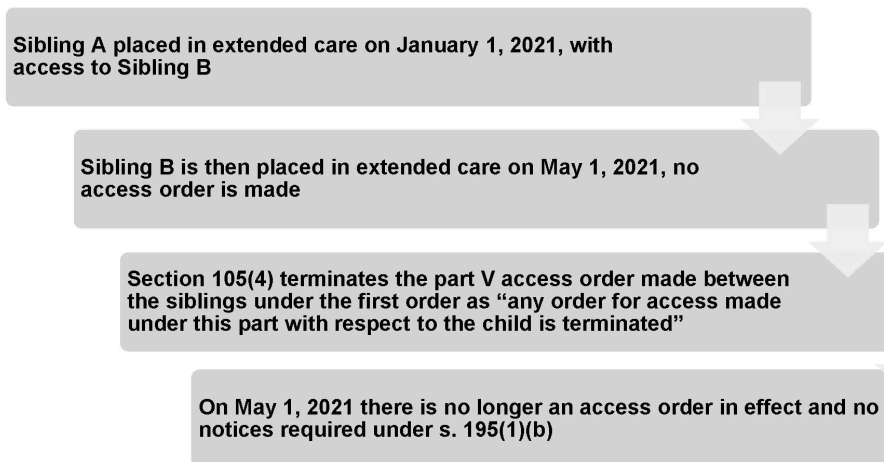
The second step, determining what access order is in effect, can be more complex than it originally appears. The *CYFSA* not only requires the Society to consider access orders that are attached to the extended care order of the child being placed for adoption, but the *Act* also requires notices to be served in relation to any Part V access order “in effect” in relation to the child. If protection proceedings for a sibling took place at a different time, the Society needs to consider any possible access orders in that other proceeding.

The timing of access orders between siblings and other young persons can have a significant impact on their rights because of the operation of section 105(4) of the *CYFSA*. Under section 105(4) when a court makes an extended care order, any access order made under Part V with respect to the child is terminated and therefore has an impact on the analysis of what access order is “in effect”.²⁴⁴ This is complicated by the fact that the children may not have legal

²⁴³ *Children's Aid Society of the Regional Municipality of Waterloo and KJR, CERD, DFD and EGI*, [2015] O.J. No. 4952; *Bruce Grey Child and Family Services v. G. (R.)*, 2015 ONCJ 412, 2015 CarswellOnt 11650 (Ont. C.J.). Both cases discuss the impact of not servicing the required notices on children.

²⁴⁴ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 105(4).

counsel to identify and raise these issues, particularly when younger children are involved. If the Society and other counsel are not attuned to this issue, children can lose significant access rights but also their right to seek openness if the Society moves to place either child for adoption in the future. The Society is only required to serve notices in relation to access orders that are “in effect” and would not serve notices for orders that were terminated by an extended care order under section 105(4). For example, child A is placed in extended care on January 1, 2021, with an access order to sibling B, who is residing with a parent. On May 1, 2021, sibling B is placed in the extended care of the Society. The operation of section 105(4) will terminate the existing sibling access order made when sibling A was placed in extended care. While it is possible for the access order to be made again in sibling B’s extended care order, this issue is not always considered. To summarize,



Justice Neill highlighted this issue in *T.H. v. Huron-Perth Children’s Aid Society*.²⁴⁵ Two of the children were placed in extended care on December 30, 2019, and the access order provided that the two children placed in extended care would have access, as access holders, to their two siblings (whose status had not been determined) who were the access recipients. The other two siblings were placed in the Society’s extended care on May 25, 2020. The order also included a sibling access order between the four children but under this order all four children were access holders with the right to seek an openness application.²⁴⁶ It was anticipated that all four children would be placed in the same adoptive

²⁴⁵ *T.H. v. Huron-Perth Children’s Aid Society*, 2021 ONCJ 457, 2021 CarswellOnt 12378 (Ont. C.J.).

²⁴⁶ *T.H. v. Huron-Perth Children’s Aid Society*, 2021 ONCJ 457, 2021 CarswellOnt 12378 (Ont. C.J.) at paras. 4 and 5.

home, but the parents appealed the May 25, 2020, order so the two children subject to that order could not be placed.²⁴⁷

Prior to the placement for adoption of two of the children, the Society served notices and all four children brought applications for openness. An issue arose as to whether the two children (who were access recipients under the December 30, 2019, order) were permitted to bring an openness application with respect to their siblings. The OCL argued that it was the May 25, 2020 order that was “in effect” at the time the notices were served and therefore all four children had the right to seek openness. Justice Neill agreed and found that it raised concerns “when extended care access orders are made at different times and whether children should have the right to notice of extended care proceedings as it could potentially impact their access rights.”²⁴⁸

There are two important points to be made from this decision:

- (a) The application of section 105(4) resulted in more rights for these children, as two of the children who were access recipients in the first order but all four were access holders under the second order. But this is not always the case. There are cases where children’s access orders were terminated without their knowledge or where children who were access holders became access recipients without any notice. When an extended care application is before the court, the parties must ensure there is a proactive assessment of all access orders, and the court must determine the access orders in effect under Part V to individuals who are not before the court. This is particularly important when siblings’ applications are dealt with at different times or/and in different Society jurisdictions.
- (b) How should the court proceed when a sibling is not a party to the proceeding and could have their access rights terminated by a sibling’s extended care order? As stated above this issue is complicated because many children are not even aware that access rights are being terminated as they do not have notice of their sibling’s extended care proceeding. Under the *CYFSA* any “parent” would receive notice of an application requesting extended care and would be a party to the proceeding under section 79(1) of the *CYFSA*.²⁴⁹ The definition of parent, for the purposes of Part V, includes “An individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child.”²⁵⁰ A strict application of this section would suggest that if sibling A has an access order to sibling B and there is an application before the Court for sibling B to be placed in the extended

²⁴⁷ It is important to note, for the purposes of this discussion, that no one sought a stay of the access order during the appeal (see para 6).

²⁴⁸ *T.H. v. Huron-Perth Children’s Aid Society*, 2021 ONCJ 457, 2021 CarswellOnt 12378 (Ont. C.J.) at paras. 10-12.

²⁴⁹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 74(1) and s. 79(1).

²⁵⁰ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 74(1).

care of the Society that sibling A is a “parent” to sibling B and should obtain notice of the proceeding and be a party to that proceeding. Justice Zisman considered this issue in *Re Proposed Adoption of PP and PL*,²⁵¹ and determined that a child cannot be a parent to a sibling. While this was an adoption proceeding and not an extended care proceeding, the rationale is relevant. Justice Zisman asked whether all of the necessary parties had been served with the adoption applications as there was a sibling access order providing for access between the children being placed for adoption and other siblings.²⁵² She considered whether the siblings should be parties to the adoption or at least be provided with notice of the adoption. Justice Zisman determined that, while on a plain reading of the legislation the siblings with an access order would fall within the definition of parent under section 137(1)(e) of the *CFSA* (the equivalent under the *CFYSA* is s.180(1)), the context of the word parent should be considered. Specifically, she found:

the definition of “parent” assumes some adult responsibility towards a dependent child. Accordingly, it is my view that a sibling with access does not fit the definition of “parent” and accordingly, it is not necessary for the siblings to be made parties to the adoption application.²⁵³

Justice Zisman, however, went on to consider whether the siblings should be given notice of the proceedings even if they were not parties. She ordered that counsel for the adoptive parents either serve the siblings with notice of the adoption application or provide the Court with additional information about the sibling relationship and the ongoing access arrangements.²⁵⁴

Returning to the issue of sibling A and sibling B in an extended care proceeding — where does that leave us? Justice Zisman’s decision suggests that while sibling A has an access order to sibling B, this does not make sibling A a parent or a party to the extended care proceeding. But Zisman J. did raise the

²⁵¹ *P. (P.), Re*, 2007 ONCJ 600, 2007 CarswellOnt 8528 (Ont. C.J.).

²⁵² This case was decided in 2007 prior to the implementation of the 2011 legislation that provided for the service of notices of an intention to place that provided children with the right to seek openness and the introduction of s. 191 of the *CYFSA* that automatically terminated existing access orders upon placement for adoption. In fact, prior to 2011 there was a statutory prohibition of placement a child for adoption if a person had access to a child. The OCL successfully sought some sibling access orders on the basis that it was the “child’s access to a person” and therefore did not prevent an adoption. Under the *CYFSA*, the situation before Justice Zisman would not occur for a child in extended care because their access orders would have terminated under s. 191 when they were placed for adoption. However, it raises an interesting issue for children who are not “placed for adoption” through a Society or Licensee (for example a relative adoption where placement is not required) because any outstanding access orders would still be in effect and are not terminated.

²⁵³ *P. (P.), Re*, 2007 ONCJ 600, 2007 CarswellOnt 8528 (Ont. C.J.) at para. 4.

²⁵⁴ *P. (P.), Re*, 2007 ONCJ 600, 2007 CarswellOnt 8528 (Ont. C.J.) at para. 5.

issue of notice. Anyone other than a child who has an access order would be considered a parent and a party for the purposes of the extended care proceeding. What does that mean for children who by virtue of their age may not fall into the definition of parent?

This is an issue that should be addressed by the Legislature. If children are not considered parents or parties, there should at least be a statutory requirement for notice of the proceeding and the option to participate with access to legal counsel. Even without legislative clarification of this provision, basic procedural fairness, the application of the *UNCRC*, and section 7 of the *Charter of Rights and Freedoms* should require some steps be taken. If a court has ordered access and that access order may terminate by way of a further court order a person should, at a bare minimum, be given notice.

Best practice, absent further legislative reform, would be to add a sibling as a party to the proceeding. A Court can then order legal representation so that the child has access to a lawyer and can put forward a claim if they want to seek access and ensure that the access order is remade if it continues to be in child's best interests.²⁵⁵ Taking that step will protect children's legal rights, allow for the Court to consider the issue, and make it clear which access order is in effect so that Societies can properly complete Notices of an Intention to Place.

(ii) *Can a child being placed for adoption bring an application seeking openness to persons not named on the access order under section 196?*

After the required Notices of an Intention to Place are served, the next significant step in an openness file is to determine whether to bring an openness application and if so, to whom. For individuals, other than the child being placed for adoption, the *CYFSA* clearly defines to whom you can seek openness: you seek openness to the child being placed for adoption. The decision-making process is more complicated for the child being placed. The OCL has brought openness applications and successfully negotiated openness orders to persons who were not named in an access order on many occasions since the legislation was introduced in 2011, however, there were some Societies that questioned whether that was permitted under the legislation. A recent decision of Justice Neill, *E.N. v. X.N., Huron-Perth Children's Aid Society*, confirmed that section 196(2) permits a child being placed for adoption, who is also an access holder, to seek openness to someone who is not listed on the access order. Justice Neill found the approach was consistent with:

²⁵⁵ If the child has previously been represented by the OCL, notice to the child should also include notice to the OCL as without access to legal representation, notice does not really actualize the right for children. If the OCL is provided with notice they can argue that the sibling should be added as a party to the proceeding. Under rule 7(1) the child is a person "against who a claim is made" and a "person who should be a party to enable the court to decide all of the issues in the case". Rule 7(5.1) provides that a child who is the subject of a case about child protection or adoption case who is not already a party, cannot be added unless the court orders otherwise but we would argue that a sibling is not the subject of the case and the regular test for adding a child as a party should apply.

- (a) a plain language reading of the *CYFSA*;
- (b) a purposeful approach under the *CYFSA*; and
- (c) Canada's obligations under the *UNCRC*.²⁵⁶

With respect to the plain language approach, Justice Neill found that the ordinary meaning of s.196(2)(c) was plain and clear.²⁵⁷ The section provides that a child who brings an application must give notice to anyone who will be entitled to have openness if the order is made. Justice Neill pointed out that section 196(2)(c) does not limit notice of the application to those listed in the access order or those who received a Notice of Intention to Place as it does when an application is being brought under section 197 — the provision that governs applications to a representative of a First Nation or FNIM Community.²⁵⁸

Further, Neill J. found that this interpretation was consistent with the purposeful approach to the legislation in that it ensures that children who are being adopted have the right to seek openness to individuals with whom they have a significant emotional tie.²⁵⁹ Justice Neill noted that the *CYFSA* has been recognized by the Court of Appeal as “remedial legislation enacted for the protection of Society’s most vulnerable children. It must be liberally construed to benefit the child.” In assessing the overall purpose of the *CYFSA*, Justice Neill identified the expansion of openness in the legislation from 2006 to 2018 and the requirement under section 185(2) on Societies to consider the benefits of an openness order or openness agreement in all adoptions:

All of these amendments reinforce that the purpose of openness under the *CYFSA* is to provide children with opportunities to maintain post adoption relationships with persons with whom they have a beneficial and meaningful and/or culturally significant relationships and where it is in the child’s best interests. A legislation provision must be assessed in all its textures — language, purpose and effect. A broad and liberal interpretation of s. 196 to permit a child being placed for adoption to apply for openness to whomever he or she has a beneficial and meaningful relationship to ensure that the relationship is preserved achieves this purpose.²⁶⁰

This interpretation of section 196(2) recognized that children’s relationships may change over time. Relationships that were important at the time of the access order may no longer be beneficial and meaningful by the time notices are

²⁵⁶ *E.N. v. X.N., Huron-Perth Children’s Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at para. 8.

²⁵⁷ *E.N. v. X.N., Huron-Perth Children’s Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at para. 15.

²⁵⁸ *E.N. v. X.N., Huron-Perth Children’s Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at paras. 10 and 11.

²⁵⁹ *E.N. v. X.N., Huron-Perth Children’s Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at para. 16.

²⁶⁰ *E.N. v. X.N., Huron-Perth Children’s Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at para. 20.

served. Conversely, the child may have new significant relationships that were formed after the access order was made.²⁶¹ Finally, Justice Neill found that the approach was consistent with Canada's obligations under the *UNCRC*, which is incorporated in the Preamble of the *CYFSA*.²⁶²

This raises important practice points for both the Society and OCL counsel. The Society is required under the legislation to consider the benefits of openness in every case and the *CYFSA* requires the Society to consider the views and wishes of children, where they can be ascertained, in all decisions.²⁶³ Conversations need to take place throughout permanency planning for children to identify relationships that are beneficial and meaningful for a child and ensure children have an opportunity to express their views. It should not be a surprise when a child seeks openness to someone who is not on an access order. Those relationships should be examined and considered throughout the planning process. Secondly, OCL counsel need to ensure they have conversations with child clients about who is important to them. It may not be the person who is listed on the access order. It may be a grandparent who has been visiting with the child because the Society has been permitting contact under section 105(9) outside of an access order. It can be helpful for the Society to request the involvement of the OCL prior to serving Notices of an Intention to Place so that there is some time to focus on the important relationships from a child's perspective rather than simply focusing on the relationship listed on an access order.

(iii) *Can the 30-day timeline to apply for openness be extended?*

Once notices have been served and a determination has been made to seek openness, the next step is to issue, serve and file an application. An application must be brought within 30 days whether the application is brought under section 196 of the *CYFSA* (where there is an access order and the access holder brings an application) or section 197 of the *CYFSA* (where openness is being requested between the child and a representative of their First Nations and/or their FNIM Community).²⁶⁴ The 30-day time limit is important to the operation of the overall scheme of the openness provisions. A Society cannot place a child for adoption until 30 days after all notices have been served or until everyone who is entitled to bring an application for openness has done so.²⁶⁵ This ensures that adoptive parents are aware of the openness sought before the child is placed in their care. Extensions of time where children have already been placed for adoption may frustrate that intent.

²⁶¹ *E.N. v. X.N., Huron-Perth Children's Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at para. 21

²⁶² *E.N. v. X.N., Huron-Perth Children's Aid Society*, 2022 ONCJ 69, 2022 CarswellOnt 2113 (Ont. C.J.) at paras. 24-26.

²⁶³ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 3, s. 8 and 185(2).

²⁶⁴ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 196(1) and s. 197(5)(6).

²⁶⁵ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 196(4) and s. 197(10).

Justice Zisman first addressed this issue in *Children's Aid Society of Halton (Region) v. P. (W.)*.²⁶⁶ Justice Zisman did not grant a requested extension of time to serve and file an openness application on the basis that the Court did not have jurisdiction to extend the 30 daytime frame set out in the *CFSA*. She further determined that she could not use the Rules to extend a time period established under the legislation.²⁶⁷

A request to extend time to file an openness application was also considered in *K.F. v. Children's Aid Society of Ottawa*. The Court was asked to use *parens patriae* jurisdiction to extend the 30-day statutory timeline. While Justice Audet found that she would not rule out the possibility, she was not prepared to do so in that case.²⁶⁸

It is important to reinforce these time limits with clients even in protection proceedings. Clients should understand that access orders will terminate upon a child's placement for adoption and that if they receive a notice, they should immediately seek legal advice. They need to understand that they will only have 30 days to bring an application.²⁶⁹ Therefore best practices may include providing the client with a copy of a Notice of Intention to Place so they understand what the notice will look like and to advise, in writing, that upon receipt of a notice, they will only have 30 days to bring an application.

(iv) *What is the involvement of prospective adoptive parents and other caregivers?*

Once an openness application is before the Court, you need to consider the involvement of non-parties in the application.²⁷⁰ If the application is brought by the Society under section 194 of the *CYFSA* (the section that provides a Society can bring an application when there is no access order in effect), adoptive parents are given notice and are parties to the proceeding. Their consent is required to any order sought. The involvement of adoptive parents is not as straight forward under a section 196 application (where an access holder brings an openness application) or under a section 197 application (where openness is requested between a child and a representative of their First Nations and/or FNIM

²⁶⁶ *Children's Aid Society of Halton (Region) v. P. (W.)*, 2013 ONCJ 132, 2013 CarswellOnt 2935 (Ont. C.J.).

²⁶⁷ *Children's Aid Society of Halton (Region) v. P. (W.)*, 2013 ONCJ 132, 2013 CarswellOnt 2935 (Ont. C.J.) at paras. 8 and 14.

²⁶⁸ *K.F. v. Children's Aid Society of Ottawa*, 2018 ONSC 364, 2018 CarswellOnt 601 (Ont. S.C.J.) at para. 12.

²⁶⁹ If notices were not served personally or a court order was not obtained for alternative methods of service, it would leave open the argument that the 30-day time limit had not begun because you were not properly served. *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 195(4), (5) and (6).

²⁷⁰ A parent is not automatically a party to an application for openness unless they are bringing the application, or the child is seeking openness to the parent. Any other parent of the child will not receive notice or be a party to the openness proceeding. *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 196(2) and s. 197(7).

Community). The adoptive parents are not parties to the proceeding, but the Society is required to keep them informed of any applications brought and the outcome of such applications.²⁷¹ Further the Court must consider their ability to comply with the proposed openness order.²⁷²

The legislation does not, however, speak to the involvement of a caregiver of a child (e.g. a sibling) who is not being placed for adoption, in the arrangements. Given that many of the openness arrangements being considered are between siblings in different placements, those non-party caregivers should also be involved in openness planning in order to develop workable openness plans.

Justice Mitrow in *J.N.-L. v. C.S.-N.* provided direction as to how both adoptive parents and other caregivers should be involved in openness proceedings.²⁷³ As a starting point, where an application for openness involves sibling contact and the siblings are not all in the care of the Society, the Court will need to know the children's legal status and who is caring for them. While these caregivers are not parties and are not referenced under the legal test, from a practical perspective the Court will likely want some evidence of the caregiver's ability to comply with the proposed openness.²⁷⁴ Justice Mitrow indicated that best practice was to provide the adoptive parents and any caregivers with a copy of the openness application (with information redacted if necessary) and to engage them in any discussions regarding openness arrangements, including involving them in any ADR processes.²⁷⁵

The Court also confirmed the jurisdiction of the Court to add both adoptive parents and caregivers as parties to a section 196 or section 197 openness application under Rule 7(5) of the *Family Law Rules* in appropriate cases.²⁷⁶

²⁷¹ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s 196(5) and (6) and s. 197(10).

²⁷² *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s 196(8) and s. 197(10).

²⁷³ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 6.

²⁷⁴ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 39(i), (iii), (vi), (vii).

²⁷⁵ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 39(viii).

²⁷⁶ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 23. At paras 25, 26 and 39 Justice Mitrow also set out the test to determine whether an adoptive parent or caregiver of another party should be added as a party. Justice Mitrow applied the considerations set out in *Children's Aid Society of London & Middlesex v. H. (S.)*, 2002 CarswellOnt 4048 (Ont. S.C.J.) and *Children's Aid Society of London & Middlesex v. P. (J.)*, 2000 CarswellOnt 718 (Ont. S.C.J.) including:

- (a) is the addition of the party in the best interests of the child?
- (b) will the addition of the party delay or prolong the proceedings unduly?
- (c) is the addition of the party necessary to determine the issues?
- (d) is the proposed party capable of putting forward a plan that is in the child's best interests; and

Justice Mitrow also provided direction about what evidence a court would require regarding the adoptive parents' ability to comply or a caregiver's ability to comply with an order under section 196 and section 197. Justice Mitrow found the preferred approach was to have all the stakeholders sign the 34M.1 Consent to an Openness Order.²⁷⁷ While the form does not provide a place for the adoptive parents to sign and their consent is not formally required, courts have accepted their signatures on the consent as evidence of their ability to comply. Justice Mitrow stated that affidavits from the Society or parties providing hearsay evidence of the adoptive parents' position should be used with caution as the adoptive parents or caregivers are not parties and would not have an opportunity to challenge the evidence, although he did not preclude the use of such affidavits.²⁷⁸

A different approach was taken in one of the first openness decisions under section 145.1.2 of the *CFSA* (the earlier equivalent of s. 196 of the *CYFA*) where Justice Baker ruled that an affidavit of the adoptive parents would be the preferred mechanism to provide evidence of their consent to the order sought.²⁷⁹ Justice Neill also commented in *T.H. v. Huron-Perth Children's Aid Society* that she was prepared to make the order on the basis of the signed 34M.1 and an affidavit from the adoptive parents setting out their ability to comply with the proposed order.²⁸⁰

The practice that has evolved in Ontario differs from jurisdiction to jurisdiction. Most commonly the adoptive parents sign the Form 34M.1 to provide evidence of their ability to comply with the order sought. That practice is easier to facilitate in jurisdictions where the local Society will provide funding for independent legal advice for the adoptive parents.

(v) *Does a party need the Court's permission to withdraw an openness application?*

The strict 30-day time limit to bring an openness application has an unintended consequence in that applications may be brought to preserve a

(e) does the proposed party have a legal interest in the proceeding in the sense that an order can be made in favour of or against them?

Justice Mitrow also noted that the Court of Appeal in *A.M. v. Valoris Pour Enfants et Adultes de Prescott-Russell*, 2017 ONCA 601, 2017 CarswellOnt 10732, 2017 CarswellOnt 10733 (Ont. C.A.) at para. 24, additional reasons 2017 CarswellOnt 16388, 2017 CarswellOnt 16389 (Ont. C.A.) that it is not necessary to prove all factors to add a person as a party.

²⁷⁷ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 39 (iii) and (v).

²⁷⁸ *J.N.-L. v. C.S.-N.*, 2019 ONSC 4384, 2019 CarswellOnt 14944 (Ont. S.C.J.) at para. 39 (iii) and (v).

²⁷⁹ See *NXT, TDNT, VJT, HLT and FMT v. The Children's Aid Society of Brant*, [unreported] September 6, 2013 (OCJ), addendum, November 27, 2013.

²⁸⁰ *T.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 457, 2021 CarswellOnt 12378 (Ont. C.J.) at para. 13.

client's rights without a fulsome understanding of the dynamics in a file. It is particularly challenging when a young child, who does not have views and wishes, is made an access holder and there is little underlying evidence as to why the access order was made.

Justice Neill in *C.H. v. Huron-Perth Children's Aid Society* considered the test for the withdrawal of an openness application brought on behalf of a child.²⁸¹ In this case, the OCL brought an openness application on behalf of CH and ZH seeking openness between the four siblings and their parents. An openness order between the siblings was made on consent, but the issue of openness with the parents was unresolved.²⁸² The children in this case were young and did not have views and preferences regarding ongoing contact with their parents.²⁸³ The OCL brought a motion to withdraw the application because the father was unable to accept the adoption plan and was becoming increasingly aggressive in his actions towards the Society.²⁸⁴ Unfortunately, the mother and father still resided together, and the mother was unable to maintain a relationship with the children without the involvement of the father.²⁸⁵

Rule 12(2) of the *Family Law Rules* (amended in 2019) requires that child parties must obtain the permission of the Court to withdraw an application and requires service on the OCL.²⁸⁶ Justice Neill considered the overarching primary purpose of the *Act* to promote the best interests, protection and well-being of children, and applied five factors to determine whether the Court would grant permission to withdraw:

1. What are the reasons for the requested withdrawal?
2. Who are the access holders and access recipients?
3. How would the withdrawal impact fairness to the parties?
4. What parties have consented to the withdrawal?
5. Do children have any views and wishes with respect to the withdrawal?²⁸⁷

Based on the facts of this case, the Court allowed the OCL to withdraw the application without costs. An important consideration in Justice Neill's analysis was that the parents were access recipients and not entitled to bring an openness application themselves. The considerations may have been different where

²⁸¹ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.).

²⁸² *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at para. 3.

²⁸³ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at para. 7.

²⁸⁴ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at para. 7.

²⁸⁵ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at para. 7.

²⁸⁶ *Family Law Rules*, O.Reg. 114/99, rule 12 (2).

²⁸⁷ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at paras. 5 and 6.

parents had a right to seek openness but chose to file an answer in the children's application as opposed to bringing their own openness application.²⁸⁸

(vi) *Can an openness order be appealed?*

There is no right of appeal specified in the *CYFSA* on an original openness order. The Court of Appeal for Ontario in *Children's Aid Society of the Region of Halton and EM and MK* upheld quashing an appeal of an openness order, commenting that the Superior Court Justice had "noted correctly that there appears to be no statutory authority under the *Act* for an appeal of an openness order."²⁸⁹ In contrast, section 208 of the *CYFSA* does provide for appeal rights from an order varying or terminating an openness order.²⁹⁰

One may be able to argue, however, that a right of appeal is found under the *Courts of Justice Act* ("*CJA*"). Section 19(1) (a.1) of the *CJA* provides for an appeal of a final order of Family Court and s.40(1) states where there is no provision for an appeal of an Ontario Court of Justice order, an appeal lies to the Superior Court of Justice.²⁹¹

9. CONCLUDING COMMENTS

Over the past two decades, Ontario's child protection legislation has evolved from a very restrictive approach in which children could not be placed for adoption if an access order was in effect. Previously, the legislation eliminated adoption as a permanency option if children had an access order with siblings, parents, grandparents, or other members of their community. Children were placed in the untenable position of either sacrificing relationships that were important to them in order to be adopted or, conversely, remaining in foster care without an adoption plan if an access order was made. That restrictive approach, unfortunately, sent strong signals to children about the value of their identity, voices, and permanency needs. It also resulted in many children losing connections with their siblings.

The evolving approach to contact, access and openness in Ontario should be viewed against the backdrop of that restrictive approach and several subsequent developments in adoptions:

- (a) Societies began facilitating adoptions for a much more diverse group of children. Through increased adoption subsidies and other outreach efforts, Societies now regularly facilitate adoptions for children with special needs and older children. Many of the children being placed for adoption have strong existing connections with family members.

²⁸⁸ *C.H. v. Huron-Perth Children's Aid Society*, 2021 ONCJ 701, 2021 CarswellOnt 20494 (Ont. C.J.) at para. 7(2).

²⁸⁹ *Children's Aid Society of the Region of Halton v. M. (E.)*, 2014 ONCA 688, 2014 CarswellOnt 13764 (Ont. C.A.) at para. 5.

²⁹⁰ *Child, Youth and Family Services Act*, S.O. 2017, c. 14, Sched. 1, s. 208.

²⁹¹ *Courts of Justice Act*, RSO 1990, c.C.43, s.19(1)(a.1) and s. 40(1).

- (b) There was a more informed understanding about the impact of moving children from racialized and Indigenous communities to families that did not reflect their culture or identity. The *CYFSA* included a recognition of systemic racism and included a reference to the *United Nations Declaration on the Rights of Indigenous Peoples*.
- (c) A child's right's framework put increased focus on children's voices in planning, culminating with the inclusion of the *UNCRC* in the Preamble of the *CYFSA*; and
- (d) Families and children were confronted with the reality of social media which necessitates more openness planning.

The legislative changes from 2011 onwards and post 2018 case law have significantly changed the practice of child welfare in Ontario. Access orders are now made on a regular basis and adoptions often involve openness arrangements that range from indirect contact to face-to-face visits. The 2018 amendments to the *CYFSA* and subsequent case law have driven a significant shift to allow children to maintain important relationships and cultural ties and to know their story. The current legislation also provides children with legal representation to navigate many access issues and most openness negotiations.

These changes are important from a child's rights perspective. Why? Children's voices can get lost without a systemic commitment to hear, listen and act upon them. It is the reason that routinely used "access at the discretion of a Society" orders raise concerns, it is the reason that children's voices were subsumed by the views of adoptive parents under the old access test, and it is the reason children's identities were often replaced with new ones in an adoption system that imposes new legal relationships. Some may view the legislative changes in Ontario as overly complex and technical, but they have resulted in significant positive changes. The legislation has implemented systemic transformation for children, it has made concrete amendments to recognize Canada's commitment to the *UNCRC*, and it recognizes children as individuals with identities that are as important as the identities of an adoptive family.

The implementation of both the access and openness provisions has undoubtedly presented challenges and has required a collaboration between Societies, legal counsel, birth families, adoptive families, and the judiciary to find both practical and legal paths to best support decision making. This significant shift in post extended care relationships needs a coordinated approach, additional education and supports for birth families, children, and adoptive parents. Many Societies have developed individual approaches to meet those needs, including developing openness education for adoptive families, providing birth parent counsellors for birth parents to help prepare birth parents for openness, automatic referral of openness files to ADR, and early openness planning to assist in transition planning for children.

The challenge in Ontario is that child welfare services are not directly delivered by the government and there are 51 different agencies that all have unique approaches to service delivery.²⁹² There are some agencies that have been

supportive of openness from a child's rights perspective early on and others that still take a more restrictive approach despite the legislative changes. Where you live in Ontario has often determined the type of openness arrangements that a child will have with their biological family. In some respects that may explain the progressive approach taken in Ontario's legislation. In other provinces, where child protection services are directly delivered, changes can be more effectively implemented by policy development at a provincial level. That is not necessarily the case in Ontario. Without strong legislative requirements, it is difficult to effect change when each individual agency sets their own policies and priorities and has different resources. The *CYFSA* has attempted to provide some uniformity in how children's rights, views and identities are recognized throughout the province.

The availability of ADR and IADR services in Ontario have been central to the implementation of access and openness planning. While the amendments stem from a child's rights framework, Ontario has invested resources and developed expertise in the ADR and IADR community to assist in developing consensual plans. These resources have been essential to ensure that most openness arrangements are thoughtfully developed in a forum that considers everyone's fears and worries. Further, openness orders are rarely obtained through contested litigation.

Openness can be complex, difficult, and fluid. There are many reasons to support openness in adoption but there will be challenges. If there is to be a real commitment under the *CYFSA* to respect a child's identity and connections to their community, that commitment needs to go beyond maintaining the relationships. There needs to be consistent funding of community-based supports like the Adoption Council of Ontario, Adopt4Life and ADR services to assist families navigating complex and ever-changing relationships.

Finally, resources need to be directed towards examining the implications of these approaches. What is working for children? What is not? What resources are available to support families and what resources are the most effective in providing that support. What are the long-term outcomes for children with openness as compared to those without? Is there a difference in rates of adoption disruptions and breakdowns when openness is part of the plan? Does the result change depending on the age of the child? What does closed adoption mean in an era of social media? There are research studies that address some of these issues, but there needs to be more research on the perspectives of children and youth in the adoption process and particularly on the experiences of Indigenous and racialized children and youth. An evidence-based approach would help us to understand the impact of ADR on openness arrangements, the impact of providing support services to biological family members, and the impact of providing education and ongoing support services to adoptive families to manage openness arrangements.

²⁹² Facts and Figures — Ontario Association of Children's Aid Societies (oacas.org).

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